

# **TRANSCRIPT OF RECORD**

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## **Supreme Court of the United States**

**OCTOBER TERM, 1954**

**No. 43**

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**THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE  
GROUP OF ALASKA INDIANS, PETITIONER,**

**vs.**

**THE UNITED STATES**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS**

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**PETITION FOR CERTIORARI FILED APRIL 19, 1954**

**CERTIORARI GRANTED JUNE 7, 1954**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 696

THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE  
GROUP OF ALASKA INDIANS, PETITIONER,

*vs.*

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF CLAIMS

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[fol. 1] **IN THE UNITED STATES COURT OF CLAIMS**

Docket No. 50385

**THE TEE-HIT-TON INDIANS**, an identifiable group of Alaska  
Indians, Plaintiff,

v.

**UNITED STATES**, Defendant.

**PETITION**—Filed October 30, 1951

1. The Tee-hit-ton Indians (whose name is sometimes spelled Tee-hit-tahn or Tihitan) are one of several similar tribes, bands, clans, or groups of American Indians in southeastern Alaska which have a common winter village at what is now called Wrangell, and which are recognized both by themselves and by neighboring Indians as the Stikine-quon (which by interpretation means the Stikine people). All the Stikine-quon speak the Tlingit language and have the same customs, laws, and traditions in common [fol. 2] with the many other Indians who speak that language and who as a whole are often referred to as Tlingits, Tlingit Indians, Tlingit tribes, or Tlingit people.

2. The subject matter of the claim presented in this petition is that area of land and water (including in each instance the timber, fish, game, mineral and other natural resources incident thereto) in southeastern Alaska which is bounded substantially as follows: Beginning at Point Baker thence following the watersheds on Prince of Wales Island to Ratz Point, thence along the middle of Clarence Strait, across the northwestern portion of Etoiin Island to Quiet Harbor, through the middle of Stikine Strait to Reef Point on Woronkofski Island, across the western portion of that Island to just beyond Wedge Point, thence between Vank Island and Zarembo Island around Zarembo Island and through the middle of Sumner Strait to the place of beginning, including all waters between Prince of Wales Island and Zarembo Island, and elsewhere extending to midchannel a distance varying from two to five miles from the shore, and comprising approximately 352,800 acres of land and 150 square miles of water, and which is hereinafter referred to as the Tee-hit-ton area.

3. The Tee-hit-ton Indians now number approximately sixty definitely listed individual members and they and their ancestors in lineal consanguinity have, as a tribe, band, clan, or group, from time immemorial continually used, occupied and claimed the entire Tee-hit-ton area in their accustomed Indian manner.

4. The Tee-hit-ton Indians' right to that area has been uniformly recognized by neighboring Indian tribes, bands, clans and groups.

[fol. 3] 5. Their right to that area is the right of full proprietary ownership in fee simple. 4

6. In the alternative their right to that area is at the very least the right to unrestricted possession, occupation, and use.

7. The substantial nature of their right to the land in that area has also been confirmed and recognized by the defendant in Section 8 of the Act of Congress approved May 17, 1884 (23 Stat. 24), and also Section 14 of the Act of March 3, 1891 (26 Stat. 1095) and Section 27 of the Act of June 6, 1900 (31 Stat. 321; 48 U. S. C. Section 356).

8. In the alternative the defendant holds title to the land, waters, and natural resources of the Tee-hit-ton area in trust for the Tee-hit-ton Indians.

9. The said Tee-hit-ton Indians are an identifiable tribe, band, clan, or group of American Indians residing within the territorial limits of Alaska.

10. On or about August 20, 1951, defendant, acting under Section 2 of the Joint Resolution of August 8, 1947 (61 Stat. 921), sold to Ketchikan Pulp & Paper Company, a corporation organized under the laws of the State of Washington, the rights for a term extending to June 30, 2004, to all merchantable timber on substantially all of the Tee-hit-ton area except Zarembo Island and the Kashevaroff Islands.

11. Such an assumption and exercise of proprietary ownership constituted a taking *pro tanto* of the Tee-hit-ton Indians' right in that area as pleaded in paragraphs 5, 6, 7, and 8 of this petition.

[fol. 4]

## First Count.

12. Plaintiff is the sole owner of this claim, has never made any assignment with respect to it, and prays for judgment for the Tee-hit-ton Indians' losses and damages from the taking pleaded in paragraph 11, together with interest.

## Second Count.

13. In the alternative, and only if or to the extent that full redress is not accorded under the First Count, plaintiff prays for such adjudications and accountings as may be appropriate under Section 3 (a) of the Joint Resolution of August 8, 1947 (61 Stat. 921), and that jurisdiction of this petition be retained so long as may be necessary for that purpose.

## Third Count.

14. Plaintiff prays for such other relief as may be just.

Respectfully, James Craig Peacock, Attorney for  
Plaintiff, 817 Munsey Building, Washington 4,  
D. C.

Williams, Myers & Quiggle, Of Counsel.

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[fol. 5] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

ANSWER—Filed February 21, 1952

Comes now the defendant by its Assistant Attorney General and for its answer to the petition of the plaintiffs herein alleges and states:

*First Defense*

1. That the plaintiffs are not a tribe, band, or other identifiable group of American Indians within the meaning of Section 1505, Title 28, U. S. C., and are, therefore, not authorized to maintain this action against the United States.
2. That if the Tee-hit-ton Indians are a tribe, band, or other identifiable group of Indians under the provisions of

Section 1505, Title 28, U. S. C. (which is denied), they have no collective, tribal, group, or clan rights to lands or waters (including in each instance the timber, fish, game, [fol. 6] mineral, and other natural resources incident thereto) described in the petition herein.

3. That if any rights exist in or to the lands or waters described in the petition (which is denied), said rights exist only as to such individuals who were in open, notorious, and actual possession of specific areas of land or water on March 30, 1867, or whose ancestors were in such possession on said date.

4. That if the plaintiffs herein were in the actual, open, and notorious possession of any of the lands or waters described in the petition (which is denied), such possession was not of such a nature as to give rise to an action against the United States for a taking thereof under the Constitution.

5. That if the United States has taken any of the lands or waters referred to in the petition, such taking does not constitute an actionable taking of land for which the United States is liable under the Constitution.

### *Second Defense*

6. Defendant admits that the Tee-hit-ton Indians are one of a group of Alaskan natives who speak the Tlingit language, but defendant denies that there is an identifiable tribe, band, or clan separate, distinct, and identifiable from other Tlingit-speaking natives. All other allegations of fact in paragraph 1 are denied.

[fol. 7] 7. No answer is made to paragraph 2 of the petition since it merely describes certain land as "The subject matter of the claim presented in this petition."

8. Answering paragraph 3, defendant states that it is without any knowledge concerning the number of persons alleged to be Tee-hit-ton Indians, but denies that said Tee-hit-ton Indians and their ancestors in lineal consanguinity have, as a tribe, band, clan, or group, from time immemorial, continually used, occupied, and claimed the acres described in their accustomed Indian manner.

9. Defendant denies generally and specifically the allegations of paragraphs 4, 5, 6, 7, 8, and 9.

10. Defendant admits that on the 20th day of August 1951 the United States, acting by and through C. M. Granger, Acting Chief, United States Forest Service, entered into a timber sale agreement with the Ketchikan Pulp and Paper Company (now known as the Ketchikan Pulp Co.), under which the said company agreed to purchase all timber marked or designated for cutting as provided in said contract and map appended thereto.

11. Answering paragraph 11 of the petition, defendant denies that the execution of the contract and agreement referred to in paragraph 10 of the petition constituted a taking *pro tanto* of any compensable interest of the plaintiffs in the lands involved herein.

### *Third Defense*

[fol. 8] 12. Further answering the petition of the plaintiffs, defendant alleges that the area of land involved and described by plaintiffs is within the exterior boundaries of Tongass National Forest; that pursuant to the Act of Congress of June 4, 1897, 30 Stat. 35, as amended, and of August 8, 1947, 61 Stat. 921, the Department of Agriculture has designated certain areas of said Tongass National Forest as Pulptimber Allotment Areas; that a portion of the lands described in the petition lies within Pulptimber Allotment Area E, and is included within the area covered by the timber purchase contract dated August 20, 1951, and more specifically described in paragraph 10 hereof.

13. That notwithstanding the inclusion of a portion of the lands described in paragraph 2 of the petition within Pulptimber Allotment Area E, and the contract of August 20, 1951, defendant alleges that there has been no actual cutting of timber therein, or on any of the lands claimed and described by the plaintiffs, nor is it contemplated that any timber will be cut or removed from the area described and claimed by plaintiffs for a number of years and possibly not during the initial operating period which expires June 30, 1964.

14. Defendant further alleges that if plaintiffs have any legal or equitable rights in and to the area described in paragraph 2 of the petition (which is denied), said rights have not, at this time, been in any way invaded, destroyed,

[fols. 9-10] or diminished by the execution of the contract of August 20, 1951.

Wherefore, defendant having fully answered the petition of the plaintiffs, prays that the same be dismissed.

Wm. Amory Underhill, Assistant Attorney General.  
Ralph A. Barney, Attorney.

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[fol. 11] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

MOTION FOR ORDER UNDER RULE 38(b)—Filed January 23, 1953 and Allowed February 4, 1953

Now comes plaintiff, by its attorney, and moves that the Court enter an order under Rule 38(b) in substantially the form submitted herewith.

The grounds of this motion are that such an order will further the convenience of the Court and of all concerned. The issues recited therein are basic but undecided questions of law which should be disposed of at the outset in order to obviate the effort and expense involved in taking voluminous evidence on what might otherwise prove to be irrelevant factual issues as to use, occupation, possession and valuation of large and remote areas in Alaska.

The decision of some of these issues might itself constitute final determination of the case, and the decision of all is essential to the most convenient and expeditious handling of the case as a whole.

Respectfully, James Craig Peacock, Attorney for plaintiff.

(Filed January 23, 1953, and Allowed February 4, 1953.)



[fol. 13] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

ORDER UNDER RULE 38(b)—February 4, 1953

A separate trial is directed with respect to the following issues of law and any related issues of fact essential to proper adjudication of such issues of law:

1. Is the plaintiff an "identifiable group of American Indians residing within the territorial limits of . . . Alaska" within the meaning of 28 U. S. C. § 1505?

2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, [fol. 14] and permittees used or occupied in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?

3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat. 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it?

4. What such rights, if any, would have inured to it under the Act of June 6, 1900, 31 Stat. 321, 330, in the area, if any, which on that date was so used or occupied by it?

5. In the event a decision of an affirmative nature on any of issues 2, 3, or 4, is followed by evidence indicating specific property rights on the part of plaintiff at any of those times, then would the testimony of plaintiff's witness Paul as to recent less intensive use of the areas claimed by plaintiff (Tr. 13-14, 29-30, 44-45, 96-97) constitute prima facie evidence of termination or loss of such rights?

6. If any such property rights are established, and had not meanwhile been terminated or lost, then would the execution of the Timber Sale Agreement of August 20, 1951, (as admitted in paragraph 10 of defendant's Answer) constitute a compensable taking of such rights, or would it give rise to a right to an accounting within the jurisdiction of this Court, or both?

All other issues of either law or fact (including the

geographical extent or boundaries of any of the areas involved) are reserved for such further proceedings as the Court may order.

(Allowed February 4, 1953.)

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[fol. 15] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

STIPULATION RE EXHIBITS AND CLOSING OF EVIDENCE—Filed  
February 6, 1953

It is stipulated by the parties through their respective attorneys of record that—

1. Plaintiff's Exhibits 4 and 5, which were originally attached to Plaintiff's Statement under Rule 29(b), are filed herewith and hereby introduced in evidence.

2. The following Exhibits are filed herewith and hereby introduced in evidence:

*Plaintiff's Exhibits*

6. Encyclopedia Britannica (1947 Ed.), Vol. 1, pages 504-505.

7. Senate Document No. 152, 81st Cong., Sess.

8. House Document No. 926, Part 2, 59th Cong., 1st Sess., pages 398, 636, 749.

[fol. 16] 9. British Association for the Advancement of Science, Fifth Report of Committee of the North-Western Tribes of the Dominion of Canada (1889), pages 5, 8, 25, 37, 38.

10. 26th Annual Report of Bureau of American Ethnology, pages 395-400.

11. Anthropological Papers of the American Museum of Natural History, Vol. XIX, Part I, pages 3, 9, 10, 11, 13.

12. Hearings on S. 2037 and S. J. R. 162, 80th Cong., 2d Sess.



*Defendant's Exhibits*

1. Krause, Aurel, "Die Tlinkit-Indianer," pages 93-115, 120-122.

2. Swanton, John R., 26th Annual Report of Bureau of American Ethnology, pages 396-399, 402, 425, 483.

3. Davidson, D. S., Family Hunting Territories in North-Western America, 46 INM, pages 18-33 and Map.

4. Hodge, F. W., Handbook of American Indians, Bulletin 30 of Bureau of American Ethnology, pages 764-765.

5. Oberg, Kalervo, pages ii, 22-62.

6. Goldschmidt—Haas Report to Commissioner of Indian Affairs on Possessory Rights of the Natives of Southeastern Alaska, pages i, ii, iii, iv, 1-25, 31-33, 123-133 a; related statements numbered 65, 66, 67, 68 and 69; and Chart 11.

In the event of further proceedings under Rule 38(b) the plaintiff reserves the right to raise the question as to how much consideration should be accorded unsworn statements [fols. 17-18] from defendant's Exhibit 6 in connection with any issue as to the specific extent or boundary of any area.

3. For the purposes of Rule 45 the evidence on the issues specified in the Order entered February 4, 1953, is closed as of the date of the filing of this Stipulation.

James Craig Peacock, Attorney for plaintiff, James M. McInerney, Assistant Attorney General, Ralph A. Barney, Attorney, Attorneys for Defendant.

(Filed February 6, 1953. Plaintiff's Exhibit 9 was subsequently enlarged to include pages 4 and 36.)

## [fol. 19] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

REPORT OF COMMISSIONER—Filed March 23, 1953

To the honorable the Chief Judge and Associate Judges  
of The United States Court of Claims:

Pursuant to the order of reference in the above-entitled case, the undersigned Commissioner makes the following report of his findings of fact:

1. Tlingit and Haida are the names of native languages of southeastern Alaska, and are also commonly used as generic terms descriptive of the Indians speaking those respective languages. The language-speaking groups called Tlingit and Haida are not now and never were in themselves land-owning units.

2. Social and property rights of Alaska Indians are inseparably intermingled. The Tlingit were divided socially into phratries. Each of the two larger phratries was in turn divided into a number of clans, membership in which descended exclusively through the mother. Marriage within the clan or phratry was forbidden because of the idea of descent from a mythical ancestor. Neither the Tlingit as a whole nor any of the phratries had any political structure or formal leadership.

3. Some of the larger clans were widely scattered throughout southeastern Alaska with local clan divisions in two or more villages in different parts of that area, while other clans were wholly localized in a single community. Some of the smaller "clans" were in reality merely subdivisions of the larger ones and should actually be called [fol. 20] "subclans." The Tee-hit-ton was in reality a subdivision or offshoot of the widespread Kiksadi clan. The Tenedi of Klawock belonged to the same subclan as the Tee-hit-ton of Stikine. Both Tenedi and Tee-hit-ton are translated as "bark-house-people"; therefore it would appear that the Tee-hit-ton had at least one local clan division outside of the Stikine area. Within the Stikine area the Tee-hit-ton had local clan divisions in two or more villages.

4. Irrespective of the phratry to which each belonged, several such local clans or clan divisions often shared a common village. Groups so associated became identified by

particular names which were geographically descriptive. Such accidental village communities were loose organizations of sometimes bitter factions, and likewise had little political significance.

5. The local divisions such as the local clans, the local subclans, or the local clan divisions were the primary political units and were autonomous.

6. The local clan or local subclan, or local clan division was also the primary owning group. The concept of land ownership did not exist but the local clan, the local subclan, or the local clan division claimed the right to exploit food and clothing resources in specific areas which had significance or importance to the people, such as hunting areas, salmon streams, or portions thereof, house sites in villages, and berry patches.

7. The Tee-hit-ton Indians are a clan or subclan of Tlingit Indians belonging to the Raven phratry; they associated with individuals from other clans in a common winter village of the Stikine geographical community on Wrangell Island, but had local clan divisions in two or more villages within the Stikine area. The Tee-hit-tons are ethnographically distinguishable as a group of American Indians.

8. This suit involves an alleged taking by defendant on August 20, 1951, of a portion of plaintiff's alleged proprietary interest in all that area of land and water (including in each instance the timber, fish, game, mineral and other natural resources incident thereto) in southeastern Alaska which is bounded substantially as follows: Beginning at Point Baker, thence following the watersheds on Prince of [fol. 21] Wales Island to Ratz Point, thence along the middle of Clarence Strait, across the northwestern portion of Etolin Island to Quiet Harbor, through the middle of Stikine Strait to Reef Point on Woronkofski Island, across the western portion of that Island to just beyond Wedge Point, thence between Vank Island and Zarembo Island, around Zarembo Island and through the middle of Summer Strait to the place of beginning, including all waters between Prince of Wales Island and Zarembo Island, and elsewhere extending to midchannel, a distance varying from two to five miles from the shore, and comprising approximately 352,800 acres of land and 150 square miles of water. The said area is

wholly within the exterior boundaries of the Tongass National Forest.

9. Russia was the only other world power that ever exercised any degree of sovereignty over any portion of what is now Alaska. Bering's second expedition in 1741 is commonly accepted as the beginning of the Russian history of Alaska, but until 1799 there was practically no exercise of Russian authority, and competing groups of Russian traders fought with each other and exploited such natives as were within their reach.

10. In 1824 the Russian Minister of Foreign Affairs formally advised one of the leaders of the Russian American Company that the Russian Government deliberately refrained from claiming, on the basis of the right of prior discovery, more territory than it could claim by virtue of the right of first permanent settlement.

11. The Russian American Company, originally chartered in 1799 and rechartered in 1821 and 1844, was in form a commercial fur and trading monopoly, but in practice it also functioned as the only governmental agency ever set up in Alaska by the Russians.

12. The Aleutian Islands and the Alaska Peninsula were the only areas ever brought fully under Russian administration, and the natives of those areas were required to work for the Russian American Company. The other Indian tribes, and the Tlingit in particular, were generally considered as independent (during the Company's first twenty years there was considerable hostility between Tlingit and [fol. 22] Russians). That distinction was recognized and formalized in the later charters.

13. In the Charter of 1821, the distinction was drawn between "tribes inhabiting the places administered by the Company" and "the independent neighboring people." Secs. 42-56 dealt at length with the former. Secs. 57-59, 68, dealing with the latter, provided in part as follows:

SEC. 57. The principal object of the Company being catching of the sea animals and wild beasts, the Company has no need to spread its rule from the coast where it practices such catchings, into the interior of the country, and it should not make effort to conquer tribes inhabiting these coasts; therefore, if the Com-

pany should think it in its interest to establish posts in some localities of the American continent in order to secure its commerce, it shall do so with the consent of the aboriginal inhabitants of such localities and shall use all possible means in order to maintain a good relationship with them, avoiding anything which might create in these people suspicion of the intention to violate their independence.

SEC. 58. The Company is prohibited to ask from such tribes tributes, taxes, dues or any other kind of contributions; \* \* \*

14. In the Charter of 1844, substantially similar distinctions were drawn and Secs. 281-285 provided as follows:

SEC. 281. The colonial government shall not forcibly extend the possessions of the Company in regions inhabited by tribes not dependent on the colonial authorities.

SEC. 282. If the colonial government deems it useful to open, for the safety of its trade operations, factories, redoubts, or so-called single posts in some places of the American continent, it shall proceed by the consent of the natives of these places, and apply all possible means to obtain their favor, trying to avoid anything which might arouse their suspicion of any intention to violate their independence.

SEC. 283. The company shall be prohibited from demanding from these people tributes, taxes, or donations of any kind whatever \* \* \*

\* \* \* \* \*

SEC. 285. The relations of the colonial administration with the independent tribes shall be limited to the [fol. 23] exchange, by mutual consent, of European wares for furs and native products.

15. Tradition has it that Russian traders visited the Stikine winter village at Wrangell more or less regularly over a period of years prior to 1867; that on their first advent they asked for and received permission to go ashore and build a storehouse; and that on their final visit they

gave the key to an Indian saying that it indicated that the property now was returned to the Indians.

16. Land titles were unknown among the peasants in the greater part of Russia, and were not regulated in the colonies. In an answer to an inquiry by the Secretary of State of the United States, the Russian government, under date of October 8, 1867, formally replied with respect to the aborigines (other than those of the Aleutian Islands and of certain islands to the far north) that—

\* \* \* From all, what we said, it clearly appears, that in this region no attempts were ever made, and no necessity ever occurred to introduce any system of land-ownership; the country occupied by savages is too vast; they use to camp in certain fit places, generally marked by mountains, rivers, and streams, each having its name, but no fixed boundaries whatever, and their migrations are guided by wild instinct and unbounded will. All this region has neither past nor present, and it may be confidently said of the future, that it is far and impenetrable. Every attempt of civilizing that country will stumble against unconquerable obstacles: the complete absence of local topography, the wild character of the savages, and no less wild character of nature; but, above all, the rigor and inconstancy of climate. \* \* \* [Translation from Russian.]

17. Smallpox, hard liquor, and loose living decreased both the number of Tee-hit-ton and the authority of local clan officials over individuals. At about the turn of the century the clan had only one woman of child-bearing age. Since that time the clan has had 65 or fewer people. Because of this population decrease, and changes in the economic patterns brought about by such things as the use of powerboats for fishing, the local clan divisions of the Tee-hit-ton (if any are left) are and have been physically incapable of controlling or exploiting the area which was once the sole support of a larger number of people, particularly [fol. 24] when significant amounts of time must be spent gaining a livelihood today under conditions which preclude extensive use either of small fishing streams or hunting areas.



18. Alaska was ceded to the United States by the Treaty of March 30, 1867. Ratifications were exchanged June 20, 1867. The full text of the treaty is reported at 15 Stat. 539, and is incorporated in this finding by reference. The United States, by payment of an additional \$200,000, purchased Alaska " \* \* \* free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; \* \* \*."

19. Alaska remained an unorganized territory until the approval of its Organic Act of May 17, 1884, 23 Stat. 24. Section 8 of that Act provided:

\* \* \* That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: \* \* \*

Section 27 of the Act of June 6, 1900, 31 Stat. 321, 330, similarly provided:

The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, \* \* \*

20. Congress has never enacted any procedure such as referred to in the quoted portion of the Act of May 17, 1884.

21. By a Timber Sale Agreement executed August 20, 1951, and expressly stated as having been made pursuant to the Act of June 4, 1897 (30 Stat. 35), as amended, and the Act of August 8, 1947 (61 Stat. 920), defendant agreed to sell to Ketchikan Pulp & Paper Company, a Washington corporation, all merchantable timber available to June 30, 2004 (estimated at 1,500,000,000 cubic feet), on a specified portion of the area described in finding 8. The Agreement included provisions that title to all timber shall remain in the United States until it has been paid for, felled, and scaled [fols. 25-26] or measured, and that under certain circumstances title to timber for which payment has been made shall revert to the United States unless removed within a

specified time. A copy of the entire Agreement and of the map attached thereto, are in evidence as plaintiff's exhibits 4 and 5, respectively, and are incorporated by reference in these findings.

Up to the present time no timber covered by the above-described Timber Sale Agreement has been cut.

Respectfully submitted.

William E. Day, Commissioner.

[fols. 27-28] ARGUMENT AND SUBMISSION OF CASE

On December 1, 1953, the case was argued and submitted on the merits by Mr. James Craig Peacock for the plaintiff and by Mr. Ralph A. Barney for the defendant.

On March 3, 1954, the case was reargued on the merits by Mr. James Craig Peacock for plaintiff and by Mr. Ralph A. Barney for the defendant, at the request of the court. The case remained under submission.

[fol. 29] IN THE UNITED STATES COURT OF CLAIMS

No. 50385

**Opinion of the Court by Madden, Judge, Finding of Fact and Conclusion of Law**—Decided April 6, 1954

THE TEE-HIT-TON INDIANS, an Identifiable Group of Alaska Indians

v.

THE UNITED STATES

Mr. James Craig Peacock for plaintiff. Messrs. Williams, Myers & Quiggle, Martin W. Myer, William L. Paul, Jr., Frederick Paul, John E. Skilling, and John H. Myers were on the briefs.

Mr. Ralph A. Barney, with whom was Mr. Assistant Attorney General Perry W. Morton, for defendant.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

This is a suit by the Tee-hit-ton Indians, a "clan" of American Indians in Alaska. They are descendants of the



earliest known native inhabitants of an area of land in southeastern Alaska. They claim that a compensable interest in land belonging to them was taken when the United States, on August 20, 1951, agreed to sell to a pulp and paper company all merchantable timber on a specified portion of the land. The Government's agreement was authorized by two statutes, the most directly pertinent of which is the Act of August 8, 1947, 61 Stat. 920. Our jurisdiction is based upon Section 1505 of the Judicial Code, 28 U. S. C. 1505.

The Government filed its answer to the plaintiff's petition and the plaintiff made a motion that the court enter an order under its Rule 38 (b) limiting the issues, for the time being, to certain issues, the solution of which might make unnecessary the taking of voluminous evidence as to use, occupation, possession and value of large and remote areas in Alaska. The court granted the plaintiff's motion and specified six issues for trial. The resolution of these issues [fol. 30] required the taking of some evidence, which was taken before a commissioner of this court, and consisted largely of public documents and historical and scientific writings. The commissioner has made a report to the court, finding the facts which he regarded as pertinent to the six questions posed by our order made under Rule 38 (b). The first of the questions is:

1. Is the plaintiff an "identifiable group of American Indians residing within the territorial limits of \* \* \* Alaska" within the meaning of 28 U. S. C. § 1505?

We answer this question in the affirmative. There seems be no difficulty in identifying the Tee-hit-ton as a group of persons. The Government, in urging that we answer this question in the negative, does not deny the identifiability of the Tee-hit-ton as persons, but denies that they, as a group or clan, owned anything. It says that even if they exploited certain lands for the purpose of taking fish or game or berries or roots from them, that was not ownership. We think that an entity, such as an individual, or a tribe or clan of Indians, which exploits land under a claim of right, to the exclusion of others, and takes from the land what is of in-

terest to it though what interests it might not interest others of a different culture, is asserting "ownership" of that land.

Though the evidence is not entirely clear as to whether the clan as a whole, or some smaller subdivision of it, such as a village unit or a house unit was the claimant of the property exploited by the Tee-hit-ton, we have concluded that some, at least, of the land exploited by the Tee-hit-ton was claimed by the plaintiff clan as a whole, and that it is, therefore, an identifiable group of Indians within the meaning of the *the* statute.

Our second question is:

2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, and permittees used or occupied in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?

[fol. 31] The plaintiff tribe would draw a sharp distinction between the nature of the interest which its ancestors had in their Alaska lands, and the interest which Indian tribes with comparable habits and customs had in the lands now included in our 48 States. We will, merely for the purpose of brevity of expression, refer to the latter Indians as American Indians, and to the plaintiff and its forebears as Alaska Indians. It says, and we agree, that its ancestors had a species of ownership in the lands which they used for hunting, fishing, and berry picking. So, of course, did the American Indians. It says that, under Russian sovereignty, before the cession to the United States by the treaty of 1867, this ownership was recognized by the sovereign, and thereby given the legal status of full, complete, and exclusive ownership, to which all the normal rules of land title are applicable. We think that that asserted historical fact has not been proved. It is true that the Russians did not exploit the interior of Alaska, and admonished its traders not to disturb the peace or alienate the good will of the natives. The failure to exploit the country would seem to have been attributable to the vast area of

undeveloped land of comparable climate which the Russians had in their own country and not to a legal attitude toward the natives different from the attitude of the Western European countries. Such land as the Russian Government wanted for its use or the use of its licensees it took. We think, therefore, that if such tribal property interest in lands as existed under Russian sovereignty survived the treaty of 1867, that interest under American sovereignty was substantially identical in nature with that of the American Indians. That meant that the extent to which it would be recognized and respected was completely subject to the will of the sovereign. *United States v. Santa Fe Pacific Railroad Co.*, 314 U. S. 339. Our conclusion then is, that if the tribal interest in land of the plaintiff tribe survived the treaty, that interest was what is called, in relation to American Indians, "original Indian title" or "Indian right of occupancy," with its weaknesses and imperfections.

As to whether tribal interests in Alaska lands survived the treaty of cession, we are in doubt, and we pass the question for the moment.

[fol. 32] In *Hynes v. Grimes Packing Co.*, 337 U. S. 86, Mr. Justice Reed in delivering the opinion of the Court, said, at page 106:

We have carefully considered the opinion in *Miller v. United States*, 159 F. 2d 997, where it is held, p. 1001, that the Indian right of occupancy of Alaska lands is compensable. With all respect to the learned judges, familiar with Alaska land laws, we cannot express agreement with that conclusion. The opinion upon which they chiefly rely, *United States v. Alcea Band of Tillamooks*, 329 U. S. 40, is not an authority for this position. That opinion does not hold the Indian right of occupancy compensable without specific legislative direction to make payment. See also *United States v. 10.95 Acres of Land in Juneau*, 75 F. Supp. 841.

The plaintiff urges, correctly, that this statement is dictum. But it is an extremely pointed expression about the Tillamooks decision which must at that time have been fresh in the minds of the justices. We therefore take this statement of the Supreme Court as law. That means that even if what

we have decided was the "original Indian title" of the plaintiffs survived the treaty of 1867, the plaintiffs would still not have a right in the land, against the Government, unless Congress had recognized the tribe's interest as a legal interest. The later *Tillamooks* decision, reported in 341 U. S. 48, is also of importance in this regard.

The Government insists that whatever interest the tribe may have had in the lands during Russian sovereignty was extinguished by the treaty.

When the United States purchased Alaska from Russia in 1867, after the sale, and the price of \$7,000,000 had been tentatively agreed upon, the United States offered to add \$200,000 to the price in return for the following assurance, which was then inserted in Article VI of the treaty.

The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto. [fol. 33] The treaty also contained, in its Article II, the following language:

In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property.

The meaning of the treaty provisions is not clear. The government says that these provisions warranted the title to the land in Alaska free of all encumbrances except interests of individuals. The plaintiff says that it meant much less than that; that it did not warrant against interests owned by a clan of Indians whose ownership, the plaintiff says, had always been recognized and had never been disturbed by the Russian Government or its agencies. The history of the times lends some support to the construction for which the plaintiff argues. Chairman Charles Sumner of the House

committee on Foreign Relations, in discussing the treaty, said:

Beyond the consideration founded on the desire of "strengthening the good understanding" between the two countries, there is the pecuniary consideration already mentioned; which underwent a change in the progress of the negotiation. The sum of seven millions was originally agreed upon; but when it was understood that there was a fur company and also an ice company enjoying monopolies under the existing government, it was thought best that these should be extinguished, in consideration of which our government added \$200,000 to the purchase money, and the Russian government in formal terms declared "the cession of territory to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, or by any parties, except merely private individual property-holders." Thus the United States receive this cession free of all incumbrances, so far at least as Russia is in a condition to make it. The treaty proceeds to say that "the cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in said territory or dominion and appurtenances thereto." In other words, Russia conveys all that she has to convey. (House of Representatives Ex. Doc. No. 177, 40th Cong. 2d Sess., pages 124, 135).

[Vol. 34] This contemporary statement tends, as the plaintiff urges, to show that the parties intended that whatever franchises issued by the Russian Government were outstanding were to be cancelled, but that existing interests which by the usual rules of international law would not be affected by the transfer of sovereignty did not have to be cleared off the land by the Russians before they could complete the transfer. The latter action would have required the Russian government to change its land law as to Alaska, abolishing tribal or clan title of lands, which was the only kind of title there was as to practically all of Alaska.

It may, with reason, be urged that Russia was not expected, for the consideration of \$200,000 to undertake the Herculean task which she, over a century of ownership, had

refrained from undertaking; that the United States merely took the formal warranty from Russia as a foundation for her own intended action of determining for herself what should be the nature and status of Indian title in Alaska lands.

The government cites us to the case of *Miller v. United States*, C. A. 9, 159 F. 2d 997, in which the Court held that the "original Indian title" of the Tlingit Indians in Alaska was, so far as tribes or bands were concerned, extinguished by our treaty of 1867 with Russia. The plaintiff urges that the question was inadequately briefed in the *Miller* case and that for that reason the Court made an erroneous decision. The government itself, in various opinions of its executives relating to this very problem, has taken the position that Alaska Indians had tribal or communal rights in lands, either as aboriginal rights which survived the treaty of 1867, or as rights created by the Acts of 1884, 1891 and 1900. In *United States v. Libby, McNeil and Libby*, 107 F. Supp. 697, which case arose after the decision in *Miller v. United States*, *supra*, in a District Court in the same Judicial Circuit where the *Miller* case arose, the government urged vigorously that the *Miller* decision was wrong, though it could hardly have expected the District Court to depart from the holding of its own Court of Appeals. Government counsel has now presented to the court a copy of a letter from the Attorney General advising the Secretary of the Interior that his department is defending several cases before the Indian Claims Commission and this court on the basis of the decision in the *Miller* case. The present position of the executive with regard to the question is thus different from its earlier position.

In view of our doubt as to the effect of the quoted provisions of the treaty of 1867 upon Indian title, and, in view of our answers to other questions, which make the resolution of this doubt unnecessary, we do not resolve it.

Questions 3 and 4 are as follows:

3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat. 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it?

4. What such rights, if any, would have inured to it



under the Act of June 6, 1900, 31 Stat. 321, 330, in the area, if any, which on that date was so used or occupied by it?

The Act of May 17, 1884, 23 Stat. 24, established a District of Alaska. The act contained this proviso:

That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.

This language would seem to mean that the physical *status quo* was to be preserved, but that the question of legal rights was reserved for future determination.

Section 14 of the Act of March 3, 1891, entitled "An Act to repeal timber-culture laws \* \* \*", 26 Stat. 1095, 1101, provided:

That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands belonging to the United States \* \* \* to which the natives of Alaska have prior rights by virtue of actual occupation \* \* \*.

Section 27 of the Act of June 6, 1900, "An Act making further provision for a civil government for Alaska \* \* \*," said:

The Indians \* \* \* shall not be disturbed in the possession of any lands now actually in their use or occupation, \* \* \*.

[fol. 36] The Joint Resolution of August 8, 1947, 61 Stat. 920, which Resolution authorized the Secretary of Agriculture to sell timber within the Tongass National Forest, and under which the timber sale involved in this litigation was made, said:

"Possessory rights" as used in this resolution shall mean all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8

of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes, native villages, native individuals, or other persons, and which have not been confirmed by patent or court decision or included within any reservation.

SEC. 2. (a) The Secretary of Agriculture, in contracts for the sale, or in the sale, of national forest timber under the provisions of the Act of June 4, 1897 (30 Stat. 11, 35), as amended, is authorized to include timber growing on any vacant, unappropriated, and unpatented lands within the exterior boundaries of the Tongass National Forest in Alaska, notwithstanding any claim of possessory rights. All such contracts and sales heretofore made are hereby validated.

(b) The Secretary of the Interior is authorized to appraise and sell such vacant, unappropriated, and unpatented lands, notwithstanding any claim of possessory rights, within the exterior boundaries of the Tongass National Forest as, in the opinion of the Secretary of the Interior and the Secretary of Agriculture, are reasonably necessary in connection with or for the processing of timber from lands within such national forest, and upon such terms and conditions as they may impose.

(c) The purchaser shall have and exercise his rights under any patent issued or contract to sell or sale made under this section free and clear of all claims based upon possessory rights.

SEC. 3. (a) All receipts from the sale of timber or from the sale of lands under section 2 of this resolution shall be maintained in a special account in the Treasury until the rights to the land and timber are finally determined.

(b) Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights to lands or timber within the exterior boundaries of the Tongass National Forest.

This latest expression of Congress seems to take special care to leave open for decision the question of the property



fol. 37] rights of the plaintiff and other tribes which might claim rights in the area covered by the Joint Resolution. The language of Section 1 shows that Congress was aware of all the claims and legal theories which have now been presented in this case, and that of Section 3 (b) shows that Congress expressly disclaimed any intention to take a position with regard to those claims. We cannot spell out of these four pieces of legislation any Congressional intent to recognize that the plaintiff and other tribes similarly situated own the lands here in question. All that Congress recognizes is that there is a legal dispute about the question of ownership.

Our answer to questions 3 and 4 is that there is nothing in the legislation referred to which constitutes a recognition by Congress of any legal rights in the plaintiff tribe to the lands here in question.

Question 5 is as follows:

5. In the event a decision of an affirmative nature on any of issues 2, 3, or 4, is followed by evidence indicating specific property rights on the part of plaintiff at any of those times, then would the testimony of plaintiff's witness Paul as to recent less intensive use of the areas claimed by plaintiff constitute prima facie evidence of termination or loss of such rights?

The government urges that, even conceding that the Tee-ait-ton may have owned or had an interest in the land here in question, they have lost that interest because, for some 50 years, their numbers have been so small that they have, as we have found, been physically incapable of controlling or exploiting the area which the clan controlled and exploited in earlier times. Since 1900, the clan has consisted of 65 or fewer persons. The area claimed comprises some 352,800 acres of land.

In view of our answer to the preceding questions, this question does not call for an answer.

Question 6 is as follows:

6. If any such property rights are established, and had not meanwhile been terminated or lost, then would the execution of the Timber Sale Agreement of August 20, 1951 (as admitted in paragraph 10 of defendant's

Answer), constitute a compensable taking of such rights, or would it give rise to a right to an accounting within the jurisdiction of this Court, or both?

[fol. 38] This question, in view of our answers to the other questions, does not call for an answer.

We answer question 1 in the affirmative. We do not answer questions 2, 5, and 6. Our answer to questions 3 and 4 is that no rights inured to the plaintiff as a result of the legislation referred to.

Prettyman, Circuit Judge, (sitting by designation); Whitaker, Judge; Littleton, Judge; and Jones, Chief Judge, Concur.

### FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner William E. Day, and the briefs and argument of counsel, makes findings of fact as follows:

1. Tlingit and Haida are the names of native languages of southeastern Alaska, and are also commonly used as generic terms descriptive of the Indians speaking those respective languages. The language-speaking groups called Tlingit and Haida are not now and never were in themselves land-owning units.

2. Social and property rights of Alaska Indians are inseparably intermingled. The Tlingit were divided socially into phratries. Each of the two larger phratries was in turn divided into a number of clans, membership in which descended exclusively through the mother. Marriage within the clan or phratry was forbidden because of the idea of descent from a mythical ancestor. Neither the Tlingit as a whole nor any of the phratries had any political structure or formal leadership.

3. Some of the larger clans were widely scattered throughout southeastern Alaska with local clan divisions in two or more villages in different parts of that area, while other clans were wholly localized in a single community. Some of the smaller "clans" were in reality merely subdivisions of the larger ones and should actually be called "clan divisions." The Tee-hit-ton was in reality a subdivision or offshoot of the widespread Kiksadi clan. The Tenedi of Klawock belonged to the same subclan as the Tee-hit-ton of

Stikine. Both Tenedi and Tee-hit-ton are translated as 'bark-house-people'; therefore it would appear that the Tee-hit-ton had at least one local clan division outside of [fol. 39] the Stikine area. Within the Stikine area the Tee-hit-ton had local clan divisions in two or more villages.

4. In a Tlingit village there were always members of at least two phratries. Furthermore, in a village there were local divisions of two or more clans. Each local division of a clan, in turn was made up of a number of house-groups and each house-group of a number of families. The village was a loose organization of often bitterly contesting clans.

5. The local units such as the local clans or the local clan divisions were the primary political units and were autonomous.

6. The local clan or local clan division was also the primary owning group. The local clan or the local clan division claimed and exercised the right to exploit food and clothing resources in specific areas which had significance or importance to the people, such as hunting areas, salmon streams, or portions thereof, house sites in villages, and berry patches.

7. The Tee-hit-ton Indians are a clan of Tlingit Indians belonging to the Raven phratry; they associated with individuals from other clans in a common winter village of the Stikine geographical community on Wrangell Island, but had local clan divisions in two or more villages within the Stikine area. The Tee-hit-ton are ethnographically distinguishable as a group of American Indians.

8. This suit involves an alleged taking by defendant on August 20, 1951, of a portion of plaintiff's alleged proprietary interest in all that area of land and water (including in each instance the timber, fish, game, mineral and other natural resources incident thereto) in southeastern Alaska which is bounded substantially as follows: Beginning at Point Baker, thence following the watersheds on Prince of Wales Island to Ratz Point, thence along the middle of Clarence Strait, across the northwestern portion of Etolin Island to Quiet Harbor, through the middle of Stikine Strait to Reef Point on Woronkofski Island, across the eastern portion of that Island to just beyond Wedge Point, thence between Vank Island and Zarembo Island around Zarembo Island and through the middle of Sumner Strait

to the place of beginning, including all waters between Prince of Wales Island and Zarembo Island, and elsewhere extending to midchannel, a distance varying from two to five miles from the shore, and comprising approximately [fol. 40] 352,800 acres of land and 150 square miles of water. The said area is wholly within the exterior boundaries of the Tongass National Forest.

9. Russia was the only world power other than the United States that ever exercised any degree of sovereignty over any portion of what is now Alaska. Bering's second expedition in 1741 is commonly accepted as the beginning of the Russian history of Alaska, but until 1799 there was practically no exercise of Russian authority, and competing groups of Russian traders fought with each other and exploited such natives as were within their reach.

10. In 1824 the Russian Minister of Foreign Affairs formally advised one of the leaders of the Russian American Company that the Russian Government deliberately refrained from claiming, on the basis of the right of prior discovery, more territory than it could claim by virtue of the right of first permanent settlement.

11. The Russian American Company, originally chartered in 1799 and rechartered in 1821 and 1844, was in form a commercial fur and trading monopoly, but in practice it also functioned as the only governmental agency ever set up in Alaska by the Russians.

12. The Aleutian Islands and the Alaska Peninsula were the only areas ever brought fully under Russian administration, and the natives of those areas were required to work for the Russian American Company. The other Indian tribes, and the Tlingit in particular, were generally considered as independent. During the Company's first twenty years there was considerable hostility between Tlingit and Russians.

13. In the Charter of 1821, the distinction was drawn between "tribes inhabiting the places administered by the Company" and "the independent neighboring people." Secs. 42-56 dealt at length with the former. Secs. 57-59, 68, dealing with the latter, provided in part as follows:

Sec. 57. The principal object of the Company being catching of the sea animals and wild beasts, the Com-

pany has no need to spread its rule from the coast where it practices such catchings, into the interior of the country, and it should not make effort to conquer [fol. 41] tribes inhabiting these coasts; therefore, if the Company should think it in its interest to establish posts in some localities of the American continent in order to secure its commerce, it shall do so with consent of the aboriginal inhabitants of such localities and shall use all possible means in order to maintain a good relationship with them, avoiding anything which might create in these people suspicion of the intention to violate their independence.

SEC. 58. The Company is prohibited to ask from such tribes tributes, taxes, dues or any other kind of contributions: \* \* \*

14. In the Charter of 1844, substantially similar distinctions were drawn and Secs. 281-285 provided as follows:

SEC. 281. The colonial government shall not forcibly extend the possessions of the Company in regions inhabited by tribes not dependent on the colonial authorities.

SEC. 282. If the colonial government deems it useful to open, for the safety of its trade operations, factories, redoubts, or so-called single posts in some places of the American continent, it shall proceed by the consent of the natives of these places, and apply all possible means to obtain their favor, trying to avoid anything which might arouse their suspicion of any intention to violate their independence.

SEC. 283. The company shall be prohibited from demanding from these people tributes, taxes, or donations of any kind whatever \* \* \*

\* \* \* \* \*

SEC. 285. The relations of the colonial administration with the independent tribes shall be limited to the exchange, by mutual consent, of European wares for furs and native products.

15. Tradition has it that Russian traders visited the Stikine winter village at Wrangell more or less regularly

over a period of years prior to 1867; that on their first advent they asked for and received permission to go ashore and build a storehouse; and that on their final visit they gave the key to an Indian saying that it indicated that the property now was returned to the Indians.

16. Land titles were unknown among the peasants in the greater part of Russia, and were not regulated in the colonies. In an answer to an inquiry by the Secretary of State [fol. 42] of the United States, the Russian government, under date of October 8, 1867, formerly replied with respect to the aborigines (other than those of the Aleutian Islands and of certain islands to the far north) that—

\* \* \* From all, what we said, it clearly appears, that in this region no attempts were ever made, and no necessity ever occurred to introduce any system of land-ownership; the country occupied by savages is too vast; they use to camp in certain fit places, generally marked by mountains, rivers, and streams, each having its name, but no fixed boundaries whatever, and their migrations are guided by wild instinct and unbounded will. All this region has neither past nor present, and it may be confidently said of the future, that it is far and impenetrable. Every attempt of civilizing that country will stumble against unconquerable obstacles: the complete absence of local topography, the wild character of the savages, and no less wild character of nature; but, above all, the rigor and inconstancy of climate. \* \* \* [Translation from Russian.]

17. Smallpox, hard liquor, and loose living decreased both the number of Tee-hit-ton and the authority of local clan officials over individuals. At about the turn of the century the clan had only one woman of child-bearing age. Since that time the clan has had 65 or fewer people. Because of this population decrease, and changes in the economic patterns brought about by such things as the use of powerboats for fishing, the Tee-hit-ton are and have been physically incapable of controlling or exploiting the area which was once the sole support of a larger number of people, particularly because significant amounts of time must be spent



aining a livelihood today under conditions which preclude extensive use either of small fishing streams or hunting areas.

18. Alaska was ceded to the United States by the Treaty of March 30, 1867. Ratifications were exchanged June 20, 1867. The full text of the treaty is reported at 15 Stat. 539, and is incorporated in this finding by reference. The United States paid an additional \$200,000 for the inclusion in the treaty of a clause stating that "The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any [fol. 43] parties, except merely private individual property holders; \* \* \*."

19. Alaska remained an unorganized territory until the approval of its Organic Act of May 17, 1884, 23 Stat. 24. Section 8 of that Act provided:

\* \* \* That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: \* \* \*

Section 27 of the Act of June 6, 1900, 31 Stat. 321, 330, similarly provided:

The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, \* \* \*

20. Congress has never enacted any procedure such as referred to in the quoted portion of the Act of May 17, 1884.

21. By a Timber Sale Agreement executed August 20, 1951, and expressly stated as having been made pursuant to the Act of June 4, 1897 (30 Stat. 35), as amended, and the Act of August 8, 1947 (61 Stat. 920), defendant agreed to sell to Ketchikan Pulp & Paper Company, a Washington corporation, all merchantable timber available to June 30,

2004 (estimated at 1,500,000,000 cubic feet), on a specified portion of the area described in finding 8. The Agreement included provisions that title to all timber shall remain in the United States until it has been paid for, felled, and scaled or measured, and that under certain circumstances title to timber for which payment has been made shall revert to the United States unless removed within a specified time. A copy of the entire Agreement and of the map attached thereto, are in evidence as plaintiff's exhibits 4 and 5, respectively, and are incorporated by reference in these findings.

Up to the present time no timber covered by the above-described Timber Sale Agreement has been cut.

[fol. 44]

#### CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is an identifiable group of American Indians residing within the territorial limits of Alaska within the meaning of 28 U. S. C. § 1505 [issue 1]; that, the court being of the opinion that the plaintiff's interest in the lands prior to the treaty of 1867 was original Indian title, which, if it survived the cession of 1867, would not be a right on which a suit against the United States could be based, does not answer the question posed in issue 2; that no property rights in the land in question enforceable by suit against the United States inured to the plaintiff by reason of the statutes cited in issues 3 and 4; that issues 5 and 6, as stated, do not call for answers, in view of the court's answers to the other questions.

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[fols. 45-46] IN THE UNITED STATES COURT OF CLAIMS

Docket No. 50385

MOTION TO DISMISS—Filed April 9, 1954

Comes now the defendant by its Assistant Attorney General and moves the Court to dismiss the petition for the reason and on the ground that the petition does not state



a claim against the United States for which relief can be granted.

In support of said motion defendant shows that on April 6, 1954 this Court rendered an opinion in which certain questions were answered and the Court concluded as a matter of law that the plaintiffs had no compensable right against the Government in the lands claimed.

Wherefore, the petition should be dismissed.

(S) Perry W. Morton, Assistant Attorney General;

(S) Ralph A. Barney, Attorney.

[fols. 47-48] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

ORDER OF THE COURT DISMISSING PLAINTIFF'S PETITION  
April 13, 1954

This case comes before the court on defendant's motion to dismiss the plaintiff's petition which motion was filed on April 9, 1954.

On the basis of the decision in this case rendered by the court on April 6, 1954,

It is ordered this thirteenth day of April, 1954, that defendant's motion to dismiss be and hereby is granted and plaintiff's petition is dismissed.

By the Court, (S) Marvin Jones, Chief Judge.

[fols. 49-50] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

PLAINTIFF'S ASSIGNMENT OF ERRORS, APPLICATION FOR CERTIFIED TRANSCRIPT OF RECORD, AND DESIGNATION OF THE RECORD—Filed April 15, 1954

Plaintiff intends to file a petition for a writ of certiorari with respect to the judgment of April 13, 1954, dismissing

the petition in this case, and therefore assigns the following errors as the points on which it intends to rely:

The Court erred in failing to hold that in Alaska aboriginal Indian title equivalent to full proprietary ownership continues to this day unimpaired by any of the limitations implicit in the familiar stateside concept of "original Indian title".

The Court erred in holding instead that "petitioner's interest in the lands prior to the treaty of 1867 was original Indian title, which, if it survived the cession of 1867, would not be a right on which a suit against the United States could be based".

The Court erred in failing to hold that property rights equivalent to full proprietary ownership and enforceable in the instant suit inured to petitioner by reason of the Acts of May 17, 1884, or of June 6, 1900.

The Court erred in failing to hold that the evidence of recent less intensive use by petitioner of its ancestral area (which evidence is summarized in paragraph 17 of the findings of fact) does not constitute a *prima facie* case of termination or extinguishment of any possessory or property rights which may be established in accordance with the immediately preceding paragraphs.

[fols. 51-52] The Court erred in failing to hold that the appropriation of timber rights implicit in the execution of the timber sale agreement by defendant's agent on August 20, 1951, constituted as of that date a partial and compensable taking of any possessory or property rights which may be so established.

The Court erred in dismissing the petition.

Plaintiff accordingly (and without prejudice to the right of either party to move at any time for transmission to the Supreme Court of the entire original record or any part thereof) designates only the following portions of the record to be incorporated into the transcript herein applied for:

Petition,

Answer,

Motion, Order, and Stipulation, (printed at R. 7-13),  
Commissioner's Report,

Opinion, Findings of Fact, and Conclusion of Law,  
Motion to Dismiss,

Judgment or Order entered April 13, 1954,

This Assignment, Application, and Designation.

(S) James Craig Peacock, Attorney for Plaintiff.

Service of copy of above Application acknowledged this  
14th day of April, 1954.

(S) Ralph A. Barney, Attorney for Defendant.

Counter designation is waived.

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[fol. 53] Clerk's Certificate to foregoing transcript omitted  
in printing.

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[fol. 54] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1953

No. 696

THE TEE-HIT-TON INDIANS, an Identifiable Group of Alaska  
Indians, Petitioner,

vs.

THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 7, 1954

The petition herein for a writ of certiorari to the Court  
of Claims is granted.

And it is further ordered that the duly certified copy of  
the transcript of the proceedings below which accompanied  
the petition shall be treated as though filed in response to  
such writ.

Office - Supreme Court, U. S.  
F. L. 350  
APR 19 1954  
HAROLD B. WILEY, Clerk

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1953**

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**No. 886 43**

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**THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE GROUP  
OF ALASKA INDIANS,**

*Petitioner,*

*vs.*

**THE UNITED STATES**

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF CLAIMS**

---

**JAMES CRAIG PEACOCK,**  
*Counsel for Petitioner.*

**MARTIN W. MEYER,  
WILLIAM L. PAUL, JR.,  
FREDERICK PAUL,  
JOHN E. SKILLING,  
JOHN H. MYERS,**  
*Of Counsel.*

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Act of June 6, 1900, 31 Stat. 321, 330	3, 4, 6
Act of August 8, 1947, 61 Stat. 920	3, 8

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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**No. 696**

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THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE GROUP  
OF ALASKA INDIANS,

*Petitioner,*

*vs.*

THE UNITED STATES

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The above-named petitioner, by its counsel of record, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in this cause.

### **Opinion Below**

The opinion below entered on April 6, 1954 (R. 16), is not yet officially reported.

### **Jurisdiction**

The judgment below was entered on April 13, 1954 (R. 33). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255(1).



### Statement of the Case

This is a suit by the Tee-hit-ton Indians, a "clan" of American Indians in Alaska. Its members are descendants of the earliest known native inhabitants of an area of land within the exterior boundaries of the Tongass National Forest in southeastern Alaska. It claims that a compensable interest in land belonging to it was taken when the United States, on August 20, 1951, agreed to sell to the Ketchikan Pulp & Paper Company all merchantable timber on a specified portion of the land. The Government's agreement was executed in accordance with the terms of two statutes, the most directly pertinent of which is the Act of August 8, 1947, 61 Stat. 920, the full text of which is set out in the opinion below at R. 23.

The judgment below (R. 16) arose out of the separate trial of a limited number of issues. In pursuance of its Rule 38 (b) the United States Court of Claims had ordered such a trial of six issues of law (and related issues of fact) the decision of which might make unnecessary the taking of voluminous evidence as to use, occupation, and value of large and remote areas in Alaska (R. 6-8). Following an argument in regular course on December 1, 1953, the case was reargued on March 3, 1954, "at the request of the court" (R. 16).

The first issue was occasioned by the Government's challenge to the petitioner's capacity to sue. Petitioners' right to maintain this suit was sustained, and that issue is not involved in this petition. The remaining issues had to do with the merits, and the judgment dismissing the petition follows the court's opinion on those issues as summarized at R. 32 in its "Conclusion of Law"—

"Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is an identifiable group

of American Indians residing within the territorial limits of Alaska within the meaning of 28 U. S. C. § 1505 [issue 1]; that, the court being of the opinion that the plaintiff's interest in the lands prior to the treaty of 1867 was original Indian title, which, if it survived the cession of 1867, would not be a right on which a suit against the United States could be based, does not answer the question posed in issue 2; that no property rights in the land in question enforceable by suit against the United States inured to the plaintiff by reason of the statutes cited in issues 3 and 4; that issues 5 and 6, as stated, do not call for answers, in view of the court's answers to the other questions."

There has never been any final decision of this Court as to the nature and extent of Indian land titles in Alaska. The gist of petitioner's case is that there are two major considerations which necessarily lead to an end result very different from the familiar stateside concept of "original Indian title". One is the fundamentally different historical, political, and legal background of Russian America. The other is the provisions of several Acts of Congress which apply only to Alaska and have never had any stateside counterparts.

### **The Statutes**

The relevant parts of all of the statutes involved already appear in full in the opinion of the court below.

The text and citation of the Acts of May 17, 1884, March 3, 1891, and June 6, 1900, dealing with the Indians' rights, are printed at R. 15 and 23.

The complete text and citation of the Joint Resolution of August 8, 1947, purporting to authorize the timber sales contract and often referred to as "the Act" of that date are printed on the following page at R. 23-24.

## The Questions Presented

In broad outline this case presents two principal questions. One is as to the present nature and extent of Indian land titles in Alaska. The other is the effect of timber sales agreements executed pursuant to the Joint Resolution of August 8, 1947.

More specifically, this petition seeks review of the action or inaction below on the last five of the six legal issues the formal terms of which are already set forth once in the court's order at R. 7-8, and a second time in its opinion at R. 18, 22, and 25. For the present purpose, however, the full scope and implications of those specific issues can be better indicated by a summary of the correspondingly numbered points as argued below—

2. Aboriginal Indian title was equivalent to full proprietary ownership, and in Alaska continues to this day unimpaired by any of the limitations implicit in the familiar stateside concept of "original Indian title."

3 and 4. Possessory rights, also equivalent to full proprietary ownership, and also peculiar to Alaska, would have accrued to petitioner under the Acts of May 17, 1884, and June 6, 1900. (Issues 3 and 4 are wholly independent of Issue 2).

5. The evidence of recent less intensive use by petitioner of its ancestral Tee-hit-ton area (as summarized in paragraph 17 of the findings of fact at R. 30) does not constitute a prima facie case of termination or extinguishment of any title or possessory rights which it may establish under Issues 2, 3, or 4.

6. The appropriation of timber rights implicit in the execution of the timber sale agreement by respondent's agents on August 20, 1951, constituted as of that date a partial and compensable taking of any title or possessory rights that petitioner may establish under the principles declared in the preceding points.

An entirely new issue has also been injected into the case by the court itself as a result of the way in which it sought to dispose of Issue 2. On the basis of its conclusion of law (R. 32) that petitioner's interest prior to the treaty of 1867 was original Indian title, it avoided deciding whether that interest survived the cession of 1867 by ruling that even if it did, such original Indian title would not be a right on which a suit against the United States could be based. That ruling, unsupported as it is by either explanation or citations, constitutes a new and additional issue.

### **Reasons Relied upon for Allowance of the Writ**

The outstanding reason why this petition should be granted is the seriousness of the present lack of an authoritative decision on any phase of the nature or extent of Indian land titles in Alaska, and the crying need for a final decision of this Court which alone can resolve the irreconcilable three-way conflict between the two courts and the one executive department which in regular course have had occasion and jurisdiction to rule upon the subject.

In order of time Solicitor's Opinion M. 31634, 47 I. D. 461, approved by the Secretary of the Interior, February 13, 1942, and reaffirmed by the Secretary three years later on July 27, 1945, and again on January 11, 1946, came first. It held that

"aboriginal occupancy establishes possessory rights in Alaskan waters and submerged lands, and that such rights have not been extinguished by any treaty, statute, or administrative action."

Next came *Miller v. United States*, 159 F. 2d, 997, decided March 18, 1947, by the Circuit Court of Appeals for the Ninth Circuit which includes Alaska. It too dealt with Alaska tidelands as to which it held that on the contrary all aboriginal rights or original Indian title stemming there-

from had been extinguished by the Treaty of 1867. It further held, however, that under the Acts of 1884, 1891, and 1900, Indian occupancy gave rise to a compensable interest, enforceable indirectly by Indian defendants in a condemnation case even in the absence of any express jurisdictional statute.

Third in the series is the decision below in the instant case, which does not accord with either of the others on any material point.

Indeed, the conflict is more nearly six-way than three-way if consideration is not confined to formal decisions made in regular course and presumably after full consideration. To cite a few factors which have contributed further to aggravate an already confused picture—

In a footnote dictum at 337 U. S. 106 (*Hynes v. Grimes Packing Co.* 337 U. S. 86, 1949) this Court suggested an inability to agree with the conclusion in the *Miller* case, although the last two sentences of the footnote indicate that the comment may have been occasioned more by criticism of the reasoning of the opinion rather than necessarily by the final conclusion itself. (The point had not been argued by either party, and it is not clear whether it was even raised by the record).

The Government's recent prosecution of *United States v. Libby, McNeil, & Libby*, 107 F. Supp. 697, (1952) reveals unusually confused and conflicting action at an intra-departmental level in still another executive department which is most illuminating in the present connection. In an effort to enjoin the operation of a commercial fish trap within the boundaries of an Alaskan Indian reservation the United States filed a brief bitterly attacking the holding in the *Miller* case that aboriginal rights had been extinguished by the Treaty. When copies of that brief reached Washington, however, the Department of Justice on August 21, 1952, wrote a letter criticising and repudiating the position taken by the United States Attorney because

(and here appears a new point to add to the confusion)—

“We believe that decision is correct in holding that there are only individual rights of occupancy in Alaska protected by the early Acts of Congress and we are relying on the *Miller* case in several actions pending in the Court of Claims and the Indian Claims Commission.”

In connection with the last clause of the quotation it will be noted that this was three years after this Court's criticism of *Miller* in the *Grimes* case, *supra*.

Enough has been said to illustrate the extent of the conflict and confusion and uncertainty which prevails all along the line. Let us turn to the unanimous representations of the highest officials from the President down which confirm the seriousness of it all and establish how important it is that the present opportunity to go a long way toward resolving this problem should be availed of to the fullest possible extent.

On May 21, 1948, the President of the United States, in a special message to Congress, warned that—

“A special legal problem is at present hampering the development of Alaska. This is the question of whether or not Alaska natives have claims to the ownership of certain land. \* \* \*

Only a few months earlier on September 18, 1947, the Governor of Alaska (an appointee of respondent and not an elected officer) reported to the Secretary of the Interior that—

“The issue of aboriginal rights will, I think all concerned agree, have to be settled at the earliest possible moment. \* \* \* Until it is, a doubt will cloud every potential investment and every venture in development in southeastern Alaska. \* \* \*



But even more informative are the official representations of the Interior Department with respect to the then pending bill which eventually became the Act of August 8, 1947, as printed at R. 23. On May 16, 1947, the Secretary of the Interior wrote the Speaker of the House of Representatives as follows—

“The question of native land titles in the Territory of Alaska has remained, in the large, unresolved throughout the history of that Territory. It is not yet authoritatively settled whether the Alaskan Cession Treaty of 1867 (15 Stat. 539) preserved or extinguished, the native or aboriginal title to lands. If not extinguished, and if not subsequently abandoned, these rights exist in some form as a valid type of land ownership (*United States v. Sante Fe Pacific R. R. Co.* (314 U. S. 339), *Alcea Band of Tillamooks v. United States*, No. 26, October Term 1946, Supreme Court). Even if aboriginal title were extinguished by the 1867 treaty, native possessory rights may well remain, in one form or another by virtue of legislative recognition. Thus, Section 8 of the Act of May 17, 1884 (23 Stat. 24), declared that ‘the Indians or others persons in said district shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them.’ See, also Section 14 of the Act of March 3, 1891 (26 Stat. 1095), and Section 27 of the Organic Act of June 6, 1900 (31 Stat. 321).

“The actual extent of native possessory rights has not yet been determined by the courts, nor has the Congress enacted any very clear definition of these rights. There has resulted a cloud upon land titles in Alaska, a tremendous uncertainty as to the amount and the boundaries of the public domain in that Territory, and a thorough-going confusion, on the part of the natives and whites alike, as to the lands which are or may be held under native title. The problem has been a troublesome one for many decades, and has become especially acute in recent years in southeastern Alaska.

“In the present state of uncertainty as to the law

and facts relating to native possessory rights in south-eastern Alaska, no attorney would be willing, in a transaction of this magnitude, to assure the contractor or his underwriters that the Forest Service had a certainly good title to the timber within the boundaries of the Tongass National Forest. For, if the native title to a particular tract were a 'valid, existing right' on September 10, 1907, when the Tongass National Forest was established, that tract is not included within the National Forest. In such cases, one relies upon the Government grant or contract at his peril (*United States v. Santa Fe Pacific R. R. Co.*, *supra*; *Cramer v. United States*, 261 U. S. 219; *Jones v. Mechem*, 175 U. S. 1."

And on May 26, 1947, the Assistant Secretary of the Interior in the same connection testified before a House Committee as follows—

"There is at this point only one major obstacle to that development, which is the aboriginal claims, or the native possessory claims under subsequent statutes of Congress, as to land and therefore as to timber within the Tongass National Forest. That is an exceedingly complex legal problem, the answer to which is clear to no person. \* \* \*

"In 1867 we acquired Alaska from Russia. The treaty may or may not have served to extinguish what we call the aboriginal, native title to the land. That has been in dispute a number of years and is still unsettled. Whether or not the treaty served to extinguish those rights the native land rights continued in some form not clearly stated, and by no means unanimously agreed upon by the interested persons, by virtue of three Acts of Congress: One in 1884, one in 1891, and one in 1900. Each served to preserve the native rights to lands occupied by the natives. \* \* \*

"Returning to this thumbnail sketch of the troubled waters of the law, if these decisions of the Supreme Court which are applicable to the continental United States apply to Alaska, then the natives have substan-

tial and probably rather extensive claims to the land embraced within the Tongass National Forest.”

The dates of all of the above representations are especially significant. Each is subsequent to that of the *Miller* case, *supra*.

The instant case has been shaped from the very outset to serve as a test case and it thus affords a medium especially well adapted for the presentation to this Court of the questions involved. It has been recognized as such a case by all interested parties. For example, in another pending case in the United States Court of Claims the Government has sought and been granted an extension of time for filing its answer until thirty days after the opinion is rendered in the case at bar. And in still another case in the Indian Claims Commission the Government has repeatedly sought and been granted similar extensions for nearly three years. Several other Alaska cases which are now pending in both of those tribunals will be affected by the final decision in this case, and current timber and oil developments will eventually make it of direct concern both to a constantly increasing number of Alaska clans and to the timber and oil interests on whose promotional efforts will depend much of the future development of that great Territory. Two recent concrete illustrations can be cited.

The Alaska press has just reported that the clans of the Yakutat community have the distinction of being the first Indians to achieve any financial gain out of oil in Alaska and in particular that they have received commitments of \$30,000 from two oil developments companies for covenants not to sue those companies for operating under leases granted by the United States. The undersigned counsel can confirm the substantial accuracy of these reports, for not only are those clans numbered among his own clients, but their concern in the present case is so great that they have

placed at his disposal a substantial contribution toward the expenses of carrying it forward.

The other illustration takes us right into the halls of the Congress itself where the House Committee on Interior and Insular Affairs has currently under consideration a Bill, H. R. 1921, the general purpose of which is to establish a sort of declaratory judgment procedure for the settlement of possessory land claims in Alaska. The importance which that Committee attaches to this subject is evidenced by the number of hearings on that subject which it has held both here and in Alaska, and by the number of prints of bills and reports which it has released from time to time. And the continuing concern of the timber interests is confirmed by the following, which appears on page 7 of recent Committee Print No. 12 of January 11, 1954:

“Legal counsel for the Ketchikan Pulp Co., by letter of November 30, 1953, has advised the Chief of the Forest Service that—

“The officers of the company are greatly disturbed by the bill insofar as it would affect lands within the Tongass National Forest, Alaska, since the company's contract of July 26, 1951, for the right to purchase timber would, as we see it, be directly affected by the bill as it is now written \* \* \* should aboriginal rights to the lands and the timber allotted to the company be established it would be possible for the courts to award to aboriginal claimants title to the lands subject to the contract of purchase. In other words, under this bill as now drawn, claimants could succeed to the rights of the Government and the company would have to deal with them instead of the Forest Service in connection with the administration of the contract. This would create an intolerable situation \* \* \*. We feel that if aboriginal claims are established to the lands of the Tongass Forest covered by the contract of July 26, 1951, with the company, the relief of such claimants should be limited to a money judgment against the United

States for the value of said lands. It would, in our opinion, amount to a breach of good faith on the part of the United States if the title to the lands covered by the company's contract would in the course of time vest in third parties as this bill contemplates. \* \* \*<sup>1</sup>

To digress for a moment from Alaska, it is common knowledge that there is a large number of pending or potential stateside cases which would also appear to be affected by the present ruling that "original Indian title \* \* \* would not be a right on which a suit against the United States could be based." If so, the importance of the review here sought is correspondingly enhanced. For even though some or all of such cases may be distinguishable on other grounds, such for example as differences in the jurisdictional acts, etc., the very existence of such a broad and unexplained and unreviewed ruling would inevitably occasion much otherwise unnecessary litigation and additional demand on the time and effort of the courts.

Whether the decision of the court below is right or wrong is of course not the immediate question. But the fact that its opinion studiously avoids any attempt to reconcile its conclusion with at least one controlling decision of this Court which was briefed and argued at length is definitely of significance at the present stage. For although it pioneers on its own initiative a new rule that "original Indian title" obtained in Alaska, it does not even mention *Johnson v. McIntosh*, 8 Wheat 543, the fountain head of all law on that subject. (Petitioner's position has always been that

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<sup>1</sup> The concern of the Company and its counsel was further evidenced by their appearance before the Committee at a hearing on January 13, 1954. The contract referred to is the same identical contract which gave rise to the case at bar. A lapse of several weeks between execution by company officers and approval by the Chief of the Forest Service accounts for the slight discrepancy in dates. See paragraph 21 of the findings of fact at R. 31. This company did not exercise the same foresight as did the oil companies at Yakutat.

the principles and reasoning of that case are more important here than the end result that happened to have been reached in that particular instance.)

WHEREFORE, petitioner prays that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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(4517)



AUG 11 1954

HAROLD B. WILLEY, Clerk

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1954

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No. 43

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THE TEE-HIT-TON INDIANS, an identifiable group of  
Alaska Indians, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

---

**BRIEF FOR THE PETITIONER**

---

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1954

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No. 43

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THE TEE-HIT-TON INDIANS, an identifiable group of  
Alaska Indians, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

---

**BRIEF FOR THE PETITIONER**

---

**OPINION BELOW**

The opinion of the Court of Claims is reported at 120 F. Supp. 202, but is not yet reported in the official reports.

**JURISDICTION**

The judgment below dismissing plaintiff's [petitioner's] petition was entered April 13, 1954 (R. 33). The jurisdiction of this Court was invoked under 28 U.S.C. Secs. 1255(1) and 2101(c) by petition for certiorari filed April 19, 1954, and granted June 7, 1954.



## STATUTES AND TREATY INVOLVED

This case arises under the following Joint Resolution (commonly referred to as the Act) of August 8, 1947, 61 Stat. 920—

### JOINT RESOLUTION

To authorize the Secretary of Agriculture to sell timber within the Tongass National Forest.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That "possessory rights" as used in this resolution shall mean all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes, native villages, native individuals, or other persons, and which have not been confirmed by patent or court decision or included within any reservation.

SEC. 2. (a) The Secretary of Agriculture, in contracts for the sale, or in the sale, of national forest timber under the provisions of the Act of June 4, 1897 (30 Stat. 11, 35), as amended, is authorized to include timber growing on any vacant, unappropriated, and unpatented lands within the exterior boundaries of the Tongass National Forest in Alaska, notwithstanding any claim of possessory rights. All such contracts and sales heretofore made are hereby validated.

(b) The Secretary of the Interior is authorized to appraise and sell such vacant, unappropriated, and unpatented lands, notwithstanding any claim of possessory rights, within the exterior boundaries of the Tongass National Forest as, in the opinion of the Secretary of the Interior and the Secretary of Agriculture, are reasonably necessary in connection with or for the processing of timber from lands within such national forest, and upon such terms and conditions as they may impose.

(c) The purchaser shall have and exercise his rights under any patent issued or contract to sell or sale

made under this section free and clear of all claims based upon possessory rights.

SEC. 3. (a) All receipts from the sale of timber or from the sale of lands under section 2 of this resolution shall be maintained in a special account in the Treasury until the rights to the land and timber are finally determined.

(b) Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights to lands or timber within the exterior boundaries of the Tongass National Forest.

Approved August 8, 1947.

Those portions of the Acts of May 17, 1884, 23 Stat. 24, and June 6, 1900, 31 Stat. 321, 330, which are also involved have been printed in the opinion below at R. 23, and are again printed in Point III of this brief at pages 42-43, *infra*.

Petitioner does not consider the text of any portion of the 1867 Treaty of Cession between Russia and the United States as involved in this case, but in case the Court desires to refer to it the text of the entire treaty as reported at 15 Stat. 539 will be found in the Appendix at page 64, *infra*.

### QUESTIONS PRESENTED

In general terms the outstanding question is one of first impression in this Court as to the extent to which aboriginal *Tlingit* Indian ownership of land has survived in southeastern Alaska.

More specifically that large question can be broken down in any of several ways. One is that presented by the issues posed in the February 1953, order of the court below (R. 7, and page 5, *infra*). In the light of that court's opinion, however, some rearrangement of that breakdown may be helpful at this stage of the case: Did petitioner's aboriginal full proprietary ownership continue unimpaired under Russian sovereignty? What was the effect, if any,

of the 1867 Treaty of Cession upon petitioner's then interest, whatever may have been its nature or extent? What was the effect of the subsequent Acts of May 17, 1884, March 3, 1891, and June 6, 1900? What has been the effect, if any, of petitioner's admittedly less intensive user of its area since the turn of the century? And, if petitioner's position on those questions is not sustained, then there is a new question injected into the case for the first time by the court below as to the extent to which so-called original Indian title is a right on which a suit against the United States may be based.

There is also a related question as to whether execution of a timber sales agreement such as that of August 20, 1951 (R. 31), constitutes a compensable taking of petitioner's interest whatever its nature.

### STATEMENT OF THE CASE

This is a suit by the petitioner Tee-hit-ton Indians, a "clan" of *Tlingit* Indians of Alaska. Its members are descendants of the earliest known native owners of an island in southeastern Alaska near its winter village at Wrangell. It claims that a compensable interest in land belonging to it was taken when the respondent United States, on August 20, 1951, executed a Timber Sales Agreement with a pulp and paper company for all merchantable timber on a specified portion of that land. The Government's action was taken under the authority of and in apparent accordance with the terms of the Act of August 8, 1947, 61 Stat. 920, the full text of which is set out in the opinion below at R. 23-24, and again printed at page 2, *supra*. R. 16-17, 26-32.

The judgment below arose out of the separate trial of a limited number of specified issues. In pursuance of its Rule 38(b) the Court of Claims had ordered such a trial of six technical issues of law (and related issues of fact) the decision of which might make unnecessary the taking of voluminous evidence as to use, occupation, and value of large and remote areas in Alaska (R. 6-8).

The first issue was occasioned by the Government's challenge to the petitioner's capacity to sue. Petitioner's right to maintain this suit was sustained, and that issue is not before this Court. The five remaining issues were—

"2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, and permittees used or occupied in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?

"3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat. 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it?

"4. What such rights, if any, would have inured to it under the Act of June 6, 1900, 31 Stat. 321, 330, in the area, if any, which on that date was so used or occupied by it?

"5. In the event a decision of an affirmative nature on any of issues 2, 3, or 4, is followed by evidence indicating specific property rights on the part of plaintiff at any of those times, then would the testimony of plaintiff's witness Paul as to recent less intensive use of the areas claimed by plaintiff (Tr. 13-14, 29-30, 44-45, 96-97) constitute *prima facie* evidence of termination or loss of such rights?

"3. If any such property rights are established, and had not meanwhile been terminated or lost, then would the execution of the Timber Sale Agreement of August 20, 1951, (as admitted in paragraph 10 of defendant's Answer) constitute a compensable taking of such rights, or would it give rise to a right to an accounting within the jurisdiction of this Court, or both?"

All five issues had to do with the merits, and the judgment dismissing the petition follows the court's opinion on those issues as summarized in its "Conclusion of Law" at R. 32 —

“that, the court being of the opinion that the plaintiff’s interest in the lands prior to the treaty of 1867 was original Indian title, which, if it survived the cession of 1867, would not be a right on which a suit against the United States could be based, does not answer the question posed in issue 2; that no property rights in the land in question enforceable by suit against the United States inured to the plaintiff by reason of the statutes cited in issues 3 and 4; that issues 5 and 6, as stated, do not call for answers, in view of the court’s answers to the other questions.”

Issue 2 is considered *in extenso* in Points I and II of this brief at pages 14 and 29, *infra*. Issues 3 and 4 are similarly developed in Point III at page 41, *infra*, as are issue 5 in Point IV at page 47, *infra*, and issue 6 in Point V at page 51, *infra*, respectively.

This case is definitely one of first impression, presenting as it does several basic questions of law as to the nature and extent of *Tlingit* Indian title in *Alaska* none of which have ever been authoritatively decided. The gist of petitioner’s case is that there are two major considerations which necessarily lead to an end result very different from the familiar stateside concept of “original Indian title”. One is the fundamentally different historical, political, and legal background of Russian America. The other is the provisions of several Acts of Congress which apply only to Alaska and have never had any stateside counterparts.

### SUMMARY OF ARGUMENT

As a preliminary to the several Points of our Argument it is shown in detail on pages 8-14, *infra*, that this case presents none of the all too familiar “difficulties” which are so commonly encountered in Indian cases and which are so comprehensively enumerated in a concurring opinion in *Shoshone Indians v. United States*, 324 U.S. 335, 354. For example, the Government’s own evidence establishes that these Indians have always had a well defined system of property ownership not unlike our own, and that under

a complex legal system title to land was recorded through elaborate ceremonials and in carvings on the famous totem poles. And so on. We submit that because of these and similar considerations which are developed more fully on those pages the instant case is entitled to consideration solely and strictly on its own legal merits as a law suit.

The gist of our argument is that there are two major considerations which necessarily lead to an end result in *Tlingit* Alaska very different from the familiar stateside concept of "original Indian title" (which the court below erroneously held to have obtained in what is now that great Territory).

One is that the historical, political, and legal background of Russian America was so fundamentally different from that of the forty-eight states of continental United States that *Tlingit* aboriginal full proprietary ownership such as that of this petitioner continued unimpaired throughout the entire period of Russian sovereignty. In particular it appears that Russia never reached Alaska until long after that great age of Sixteenth Century exploration and discovery which Chief Justice Marshall marked as the historical starting point of the stateside concept of so-called "original Indian title"; that when Russia did reach Alaska it did not interfere with native ownership—at least not in the *Tlingit* section of southeastern Alaska in which alone we are presently interested; and in a word that there was nothing in the *Tlingit* picture which fits in with or "qualifies" under "original Indian title" as that concept has been developed in the long line of cases which stem from *Johnson v. McIntosh*, 8 Wheat, 543. See Point I at page 14, *infra*. A corollary to this branch of the case is that the continuance of petitioner's unimpaired full proprietary ownership was in no wise affected by the 1867 treaty of cession. See Point II at page 29, *infra*.

The other principal consideration is that two Acts of Congress passed in 1884 and 1900, which apply only to Alaska and have no stateside counterparts, at one and the

same time recognized rights stemming as in petitioner's case from aboriginal ownership, and also independently created a new and co-existing right of full proprietary ownership. See Point III at page 41, *infra*.

Because of changing social and economic conditions petitioner's user of its area has admittedly been less intensive since the turn of the century, but it is shown that the law is well established that such facts do not constitute even *prima facie* evidence of any termination of petitioner's interest, whatever may have been its nature. See Point IV at page 47, *infra*.

The argument then turns to a different aspect of the case in response to the defense pleaded in respondent's answer that a cause of action has not yet accrued. It is shown on the contrary that the cases sustain our position that appropriation of timber rights implicit in the execution of the Timber Sales Agreement by respondent's agents on August 20, 1951, constituted as of that date a partial and compensable taking of plaintiff's interest, whatever may have been its nature. See Point V at page 51, *infra*.

And finally, even if it be assumed for the sake of argument that "original Indian title" ever obtained in Alaska it is shown that the court below erred further in the legal consequences which it attributed thereto, and particularly so in the undue emphasis which it sought to place on a distinction between recognized and unrecognized title of that sort. See Point VI at page 57, *infra*.

## ARGUMENT

### *Preliminary considerations.*

This case presents none of the familiar "difficulties" which so often underlie any effort to settle an Indian grievance through the medium of a law suit and which were so comprehensively enumerated in a concurring opinion of two Justices in *Shoshone Indians v. United States*, 324 U. S. 335, 354. We deem it not amiss there-



fore at the very outset of our argument to stop and point out how fundamentally different in every material respect are the corresponding circumstances in the instant case.

We start with the actual findings below. *Tlingit* and Haida are the names of two native languages of southeastern Alaska and are also commonly used as generic terms descriptive of the Indians speaking those respective languages (R. 26). The present petitioner is a clan of such *Tlingit* Indians (R. 27). It may also be noted that Congress has recognized the *Tlingit* and Haida Indians as those residing "in the region known and described as southeastern Alaska, lying east of the one hundred and forty first meridian" (49 Stat. 388), i.e., east of Mount St. Elias. Our case is bottomed on considerations which have to do solely with *Tlingit* Alaska (or in other words with only a part of what is commonly referred to as the narrow southeastern "panhandle"), and do not concern the vast reaches of those hundreds of thousands of square miles aboriginally inhabited, if at all, by non-Indian Aleuts and Eskimos. Cf. Plaintiff's Exhibit No. 3, Tr. 34-35.\*

With these premises in mind let us turn to the *Shoshone* case, *supra*, typical as it was of so many Indian cases dealing with the rights of "extremely primitive men" who "did not know what land titles were", "had no sense of property in land", and "had no system or standard of exchange". *But this is no such case.* That the *Tlingit* Indians now before this Court may well be proud of an ancestral culture and civilization more nearly comparable with that of the Aztecs of Mexico and the Incas of Peru is amply established in the record of this case, and particularly by an official Government report already in evidence as *Defendant's* Exhibit 6 (R. 9), from page iv of which we quote briefly —

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\* For convenient examination by this Court, if it so desires, all the evidence below (Transcript pages 1-99, Plaintiff's Exhibits Nos. 1-12, and Defendant's Exhibits Nos. 1-6) has been certified to and lodged with the Clerk of this Court, and will from time to time be referred to throughout this brief.

"The **Tlingit** and Haida Indians have continuously used and occupied the lands and waters of South-eastern Alaska since before the first exploration in the area. They used all the bays, inlets, islands, and streams from a little south of the mouth of the Copper River to the southern tip of Alaska. Without knowledge of writing, hard metals or machinery, they **developed one of the highest forms of civilization in aboriginal America north of Mexico. It was rich in ceremony and creative arts, and complex in its social, legal and political systems.**

\* \* \* \* \*

"The Tlingit and Haida utilized all the major resources in the area, except gold, which was of no value to them. The native economy utilized the teeming fish, including salmon, halibut, eulachen and herring, the great variety of berries and many other edible plants, the sea and land mammals, the shell fish and seaweed of the tidelands, the forest timbers of cedar, spruce, hemlock, and cottonwood, stone, and even copper.

"The natives had a well-defined system of property ownership which was not unlike our own, except that **the land was generally held in the name of a clan or house group, with joint usage by such an extended family. Title to land was obtained by inheritance or as legal settlement for damages; it was never bought or sold. It was recorded in the minds of all interested parties by elaborate ceremonials and the distribution of goods among the people (potlatches), which were necessary before land ownership could be recognized. Deeds were sometimes further recorded in the carvings of the famous totem poles.**"

To substantially the same effect is the rest of the evidence, from which we could continue to quote indefinitely. But in order to keep this preliminary statement within reasonable bounds we must largely content ourselves with such general references as to *Defendant's* Exhibit 5 (R. 9) in which an entire Chapter II (beginning

at page 54) is devoted to the subject of *Tlingit* clan property, and with two more especially pertinent quotations from *Defendant's Exhibit 6* (R. 9) —

“Each subdivision of the *Tlingit* had at least one winter village [in this instance Wrangell] \* \* \*. Each clan of a village went to its fishing, berrying, and hunting places each year, and returned to the village to lay away stores for the winter.” (Page 19.)

and, under the title, “Review of Community Boundaries”—

“(3) that each community [e.g. Wrangell] has a distinct territory recognized by themselves and by the neighboring communities; (4) that these lands were held under a recognized tenure system by the clans of which each community consisted; (5) that the ownership of land was recorded in tradition by means of the potlatch and totem pole; (6) that the lands, beaches, and waters were used intensively by the ancestors of the people now [1946] dwelling in the area, according to native matrilineal succession; (7) that the usages to which these lands, beaches and waters were put continue to be significant in the daily life of the natives living in this area \* \* \*.” (Page 32.)

And as still further *indicia* of what even from our modern standpoint may be deemed to be the relatively higher culture of the *Tlingit*, mention might be made of their permanent wooden houses often 60 feet in length by 40 or 50 feet in width. Tr. 12-13; Plaintiff's Exhibit 11 (R. 8), page 11; *Defendant's Exhibit 6* (R. 9), particularly pages 10-11; and cf. *Defendant's Exhibit 5* (R. 9), pages 28-30. See picture of such a house in Plaintiff's Exhibit 11, page 11.

Turning now to certain other considerations developed in the *Shoshone* opinion, here is no “vague” or “nebulous” claim to millions of acres, but a specific claim to only a specific *part* of a specific and intensively used 350,000 acres

(R. 1, 28)\* the "aboriginal use and ownership" by petitioner clan of most of which is already conceded and proved by *Defendant's* Exhibit 6 (R. 9), Chart 11. (Note the legend "Tihitan" imposed at least six times on the map of Prince of Wales Island and neighboring areas in that Chart.) Here is no ancient, ambiguous treaty to be construed. Nor are the courts asked to go back "three quarters of a century", or to award anything to "descendants" of a wronged earlier generation. On the contrary the wrong here complained of is a current one which did not occur until 1951, and the clan membership today is substantially the same as then. And by the same token here is no item of interest looming up in astronomical amounts which overshadow that of the principal claim itself. Nor do such matters as measure of damages or judgment offer any insuperable difficulties. For without prejudice to full consideration of the former at a proper time and place, it is obvious that the quantities and prices quoted in the specifications prepared by the Government and incorporated in the Timber Sale Agreement (Plaintiff's Exhibit 4, R. 8), are pertinent evidence on that issue. And so far as concerns a possible judgment, here is no special jurisdictional act like that in *Shoshone* where the attorneys would have been the only prospective cash beneficiaries. For this suit is brought under 28 U.S.C., Sec. 1505—one of the several sections of Chapter 91 dealing generally with the jurisdiction of the Court of Claims. If petitioner prevails it will be in exactly the same position as any other successful plaintiff in that court.

Under all these circumstances we submit that the instant case and its supporting argument is entitled to considera-

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\* Comparison of Petitioner's Exhibit No. 5 (R. 8) with its Exhibit No. 3 (Tr. 34-35) and R. 27-28 shows that the 1951 Timber Sale Agreement did not include Zarembo Island, and that the area actually involved in the instant case is therefore very substantially less than the total 352,800 acres of the entire Tihitan area. In a word, the whole area here involved is only about one-quarter the maximum size attained by a world famous *individually owned* ranch right here in the States.

tion strictly on its legal merits as any other law suit, unprejudiced and uninfluenced by conscious or even subconscious considerations along lines which so understandably crystallized in the *Shoshone* case, *supra*.

This would also seem as appropriate a place as any other to mention—even if it is a little by way of anticipation—a somewhat similar consideration which points to a similar conclusion. A few pages further on in Point I of this brief the leading case of *Johnson v. McIntosh*, 8 Wheat, 543, will be discussed and quoted from at length. But except for a passing reference at that point to certain apologetic and even ironical aspects of Chief Justice Marshall's opinion the present is perhaps a better connection in which to point out the extent to which the final decision in that case may well have been influenced by practical considerations of what might be loosely packaged under the general heading of estoppel. True, that opinion, like a modern skyscraper and its steel framework, is built around a consistent and logical skeleton of legal reasoning anchored on a firm foundation of sound principle. But one cannot read it as a whole without realizing how replete it is with none too subtle intimations that its end result so necessary to support the validity of the great mass of existing titles throughout the United States was from the very outset what we would call in today's vernacular a "must". Cf., for example, pages 572, 574, 579, 580, 587, 588-589. Space does not permit full quotation from those pages, and we limit ourselves to two. One is factual—

"Yet almost every title within [New England, New York, New Jersey, Pennsylvania, Maryland, and a part of Carolina] is dependent on these grants." Page 579.

The grants referred to were, of course, the grants by the crown of the soil which was still in the occupation of the Indians. The other quotation is typically apologetic—

"Although we do not mean to engage in the defense of those principles which Europeans have applied to

Indian title, they may we think find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them." Page 589.

The immediate significance of all of which is simply that in the instant case there can be no possibility of any such feeling of compulsion of any sort. Until 1951, no one other than the Indians had acquired any rights, vested or otherwise, in the soil of the virgin forest which covers the area here in suit. Indeed, to the best of our present information there have for years been no white men on the area with the possible recent exception of one casual squatter near Point Baker.

**I. Petitioner's aboriginal full proprietary ownership continued unimpaired throughout the period of Russian sovereignty, and the court below therefore erred in its fallacious premise that somehow or other that ownership had been cut down to mere so-called "original Indian title".**

*Issue 2.*

This Point and the immediately following Point II deal with Issue 2 (R. 7), which is again repeated for convenient reference—

"2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, and permittees used or occupied in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?"

*Aboriginal ownership.*

Under the terms of the February 4, 1953, order below (R. 7-8) decision of the geographical extent of petitioner's ownership is reserved for further proceedings, but the court below has already found as a fact that petitioner is

a clan of *Tlingit* Indians (paragraph 7 at R. 27), and on the basis of the record already made has in its opinion similarly conceded that some part, at least, of the lands originally exploited by the Tee-hit-ton was claimed by petitioner clan as a whole (R. 18), and that the aboriginal clan "had a species of ownership in the lands which they used for hunting, fishing, and berry picking" (R. 18).

Such an understatement by that court is difficult to understand in the light of our having quoted at the same length in our brief to it from all three of the cases to which we now turn. But be that as it may, this Court has unqualifiedly recognized from the very outset that full proprietary ownership of the soil at the communal level of the tribe or group was a definite legal attribute of aboriginal Indian title. Indeed the very premise of that much cited leading case, *Johnson v. McIntosh*, 8 Wheat, 543, 574, was that—

"The original inhabitants \* \* \* were admitted to be the rightful occupants of the soil, with a **legal** as well as a just claim to retain possession of it, and to use it according to their own discretion \* \* \*."

The nature of that facet of Indian title was still further amplified in *Mitchell v. United States*, 9 Peters 711, 745-746—

"friendly Indians were protected in the possession of the lands they occupied, and were considered as **owning** them by a perpetual right of possession in the tribe or nation inhabiting them, **as their common property** \* \* \*."

"Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its conclusive enjoyment in their own way and for their own purposes were \* \* \* respected. \* \* \* Such, too, was the view taken by this Court of Indian rights in the case of *Johnson v. McIntosh*, 8 Wheat, 571, 604, which has received universal assent."



And a generation later the same basic premise was reiterated and elaborated in *Holden v. Joy*, 17 Wall. 211, 243-244—

“Beyond doubt the Cherokees were the **owners** and occupants of the territory where they resided before the first approach of civilized man to the western continent, deriving their **title** as they claimed from the Great Spirit, to whom the whole earth belongs, and they were unquestionably the sole and exclusive masters of the territory, and claimed the right to govern themselves by their own laws, usages, and customs. \* \* \*

“Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original **title**, acquired by immemorial possession, commencing ages before the New World was known to civilized men. **Unmistakably their title was absolute,\*** subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs. Evidently, therefore, the Cherokees were competent to make the sale to the United States \* \* \*,”

That full proprietary ownership of the soil at the communal level of the tribe or group was a definite attribute of aboriginal Indian title has thus become established law.

Indeed if this proposition needed further support it can be found specifically in the case of a clan of *Tlingit* Indians such as this petitioner. For in a Government report intro-

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\* Although the remainder of this sentence deals with what is now known as “original Indian title”, these first five words are “unmistakably” descriptive of the preceding consideration of aboriginal title.

duced in evidence by the respondent itself we have already learned that—

“The **Tlingit** and Haida Indians \* \* \* developed one of the highest forms of civilization in aboriginal America north of Mexico. It was rich in ceremony and creative arts, and complex in its social, legal and political systems. \* \* \*

“The natives had a well defined system of property ownership which was not unlike our own \* \* \*. Title to land was obtained by \* \* \*. It was recorded in the minds of all interested parties by elaborate ceremonies \* \* \*. Deeds were sometimes further recorded in the carvings of the famous totem poles.” (Defendant’s Exhibit 6, R. 9, page iv.)

And Chart 11 of the same Exhibit shows at least six portions of the Wrangell area as having been in the “aboriginal use and ownership” of the “Tihitan” (one of the many common variations in the English spelling of petitioner’s name).

Thus petitioner’s chain of title starts with unquestioned full proprietary ownership. The court below held in its opinions and its conclusion of law that somehow prior to the treaty of 1867 that ownership had been impaired down to what is known as mere “original Indian title” (R. 32). That such a conclusion is utterly unfounded will be the subject of the following pages of this Point.

### “*Original Indian title.*”

First of all just what is this concept which is now so generally and so indifferently called “original Indian title”? The implications of its name are indeed so misleading that before going further it is of prime importance to thoroughly explore its precise meaning and significance. There probably has been no better short definition than that found at page 46 of the opinion joined in by four members of this Court in *Alcea Band of Tillamooks v. United States*, 329 U. S. 40—

“It has long been held that by virtue of discovery the title to lands occupied by Indian tribes vested in the sovereign. This title was deemed subject to a right of occupancy in favor of Indian tribes, because of their original and previous possession. It is with the content of this right of occupancy, this original Indian title, that we are concerned here.”

It is highly significant that the writer of that opinion deemed it necessary to cite in its footnote only a single supporting authority; viz., *Johnson v. McIntosh*, 8 Wheat. 543, 573-74 (1823), a case which we will shortly discuss at quite some length.

In considering that case, however, it should attribute to clearer thinking to bear in mind two thoughts. One is that on final analysis this concept of “original Indian title” will prove to be more in the nature of an end result rather than a true principle of law as it might be supposed to be after having occurred more than thirty times in the opinions in the case just quoted from. The other, and much more to the point is that its content is just about as far removed from that of aboriginal title as are the two poles. We have just seen how true aboriginal title includes all the incidents of full proprietary ownership. But so-called original Indian title is merely the right of continuing an initial aboriginal occupancy or in a word it is simply a right to stay put. Its only relation to aboriginal title is that it may have started back there, but today the term denotes only the mere residuum which is left after stripping away all the other valuable incidents which go to make up full ownership.

It is only fair to say, however, that the misleading name and the unhappy aura of misrepresentation which has thus become almost an integral part of this concept are no fault either of the great judge who first stated it (but did not name it) or of the present generation of his brethren on the bench who inherited a ready made and apparently innocuous term. That part of it seems to have grown up

spontaneously during the many intervening years, and it would serve no useful purpose at this time to delve further into the story of a name.

But it is extremely worth while and necessary to go back a century and a quarter and find out just how the concept itself came about. It first saw the light of day as a judicial decision *reached in the conventional manner of applying a general principle to facts of a particular case*. That is of prime importance because we ask only that this Court follow that same pattern and apply that same principle, which incidentally has never since been subjected to the slightest question. In passing it may clear the air to explain briefly how the universal stateside treatment of this concept as a rule of law, while not technically correct, is nevertheless logical and reasonable enough. And in any event readily understandable. For the historical facts of European discovery to which the controlling principle has applied have been so uniform throughout the area of the forty-eight states that arrival at the same result has been inevitable—and indeed in most instances has been taken for granted by all concerned—and opinion writers have had no occasion to stop to consider whether a different result might have to be reached somewhere else, as for example in Alaska.

### *Johnson v. McIntosh.*

All of which takes us squarely back to that great fountain-head of all law on Indian titles, the only case which was cited or even needed to be cited in the *Tillamooks* opinion, *supra*. *Johnson v. McIntosh*, 8 Wheat. 543, is the source of everything that is known today as "original Indian title". It first saw the light of day as a judicial decision reached in the conventional manner of declaring a principle and then applying that principle to facts, and *we ask only that this Court follow that same pattern and apply that same sound principle which has never been questioned to this day*.

The issue in that case was very clear. Could a good title to land be sold and conveyed by the stateside Indian tribes which at the time of the discovery of America "were . . . the absolute owners and proprietors of the soil" (page 545)? This Court's answer was in the negative—for reasons developed in the opinion by Chief Justice Marshall.

The land involved in that particular case lay in the state of Illinois, but the opinion reviewed at length the story of how "our whole country has been granted by the crown while in the occupation of the Indians". (Page 579.) But in this instance no abstract principle such as judicial supremacy or the implied powers of Congress had to be developed through those long processes of metaphysical reasoning for which its writer is so justly famous. On the contrary in the very opening paragraphs of the opinion that great judge himself disavowed any such necessity and recognized that the controlling principles had long since been established, and that *judicial inquiry was to be directed rather toward determination of the historical facts to which they were to be applied*. We quote from page 572—

"The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive a title which can be sustained in the courts of this country. "As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as **the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie**; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great decree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles, also, which our own government has adopted in the particular case, and given us as the rule for our decision."

The opinion then plunges into a lengthy—and at times highly apologetic and even ironical—historical review of the none too pretty picture of discovery and conquest of this continent by “the great nations of Europe”; of a tacit and patronizing agreement among themselves that “bestowing” the boon of “civilization and Christianity” on the natives “made ample compensation” for taking over much of the latter’s unlimited independence, including the power to dispose of the soil at their own will; of consistent claiming, exercising, implementing, and asserting that newly acquired “dominion” over the soil through the medium of large grants to their own subjects of “the exclusive right of purchasing such lands as the natives were willing to sell”;<sup>\*</sup> of eventual succession of the United States to sovereignty (and with it to the related responsibility of protecting established titles) at a time when “the property of the great mass of the community” traced back to purchases or deals of one kind or another under those very grants; and of the imperative practical necessity for final confirmation of such titles by the Court over which he presided.

That intensive historical review, covering as it does the greater part of the remaining thirty odd pages of the opinion, painstakingly enumerated each of those predecessor “great nations of Europe”, and their respective discoveries, wars, negotiations, and treaties, even down to the then recent “magnificent purchase of Louisiana” and “our late acquisitions from Spain”. Its enumeration included the activities of all the nations whose discoveries are now embraced within the boundaries of any of our forty-eight states—Spain, France, Holland, and England. Portugal was also mentioned as having sustained her claim to the Brazils by the same title. But significantly enough, and correctly so, there was no reference whatever

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<sup>\*</sup>This particular quotation is from Marshall’s later opinion in *Worcester v. Georgia*, 6 Pet. 514, 545, although the thought is from *Johnston v. McIntosh*.

to Russia although the interests of American traders and whalers in Alaskan waters had by 1823 when this opinion was written already become the subject of open diplomatic negotiations.

Thus the concept of original Indian title is at most a stateside end result, and as such is necessarily of no controlling effect one way or the other in Alaska. But the underlying principles upon which it rests, and which it necessarily implies, are fundamental and of general application. Particularly so the already quoted rule from *Johnson v. McIntosh*, supra, that

“the title to lands \* \* \* is and must be admitted to depend entirely on the law of the nation in which they lie.” (Page 572.)

and the pattern established by this Court in applying that fundamental principle to cases involving Indian lands.

Before passing on let us have clearly in mind that that pattern calls for judicial inquiry by the courts into the historical or other background necessary to the application of the principle just quoted, and for determination of “the law of the nations” in which the lands lie. Just as this Court in that case went at length into “further proofs of the extent to which this principle has been recognized” (page 581), so let us look into the applicable law and policy or absence thereof under Russian sovereignty.

### *The Russian era.*

How totally different in every material respect was the Alaska picture back in the pre-1867 Russian days. In *Johnson v. McIntosh* this Court apparently had to supplement the record by taking judicial notice of historical facts of common knowledge, but here the pre-American story is fully developed in paragraphs 9-16 of the findings of fact at R. 28-30, and it is urged that these paragraphs be read again at this point. Briefly, so far as concerns the *Tlingit* area, there was, with only minor exceptions any-



where and none in the area presently involved, no interference with the natives' use or ownership of the soil, no grants to non-natives of any interest in the soil, no assertion of even a right to make such grants. On the contrary pioneering Russian subjects were on more than one occasion expressly and very formally admonished to respect the natives' aboriginal rights, and in particular to secure their consent to the establishment of even a trading post (R. 28-30).

At the very end of the era in 1867 the Russian Government formally advised our Secretary of State that

"no attempts were made, and no necessity ever occurred to introduce any system of land ownership."  
(R. 30.)

By the same token the plaintiff's aboriginal ownership under *Tlingit* law and custom thus remained unimpaired at the time of the cession to respondent in 1867.

That there should have been such a radical difference between the policies of Russia and those of the other European nations which at one time or another exercised sovereignty over what is now American soil can indeed be readily understood. England, Holland, France, Spain, and Portugal were as Chief Justice Marshall himself expressly termed them in his later opinion on the same subject in *Worcester v. Georgia*, 6 Pet. 515, 543, "great maritime powers".\* Their discoveries and colonization

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\* Some interesting background with respect to Russia not having been a party to the tacit agreement of the "great maritime powers" referred to by Chief Justice Marshall may be found in the Government's own recent brief in another case—Brief of the United States on Preliminary Hearing in Indian Claims Commission Docket No. 31, *Clyde F. Thompson et al. v. United States*. Under the sub-heading "Basic Concepts" at pages 7-9, the history of this doctrine of discovery as developed by Chief Justice Marshall in *Johnson v. McIntosh* is amplified by projecting the reader's thinking even further back to its very beginnings in the 14th Century. Citing a bull issued by Pope Clement VI in 1344, and two bulls by Pope Alexander VI in 1493, it is pointed out that "this dogma

in America stemmed from explorations largely actuated in the first instance by the pressures of expanding populations and the urge to find a shorter route to the fabulous riches of the Indies. Such a common objective of material aggrandizement on a national scale quite naturally led to appropriation and distribution of the vast reaches of land which constituted the principal wealth of the New World. Russia on the other hand was not primarily a maritime nation, and indeed already had ample territory in both Europe and Asia. Russian explorations in the higher latitudes of contiguous Northern Asia, by portages from one river to another, were more in the nature of gradual expansion by hunters and traders than of outright discovery.

What is even more to the point, at no time during the Sixteenth Century era of discovery was Russia confronted with any competitive discovery or expansion—whichever way its own activities may be catalogued—and thus had no occasion to participate in any understanding with other nations on this subject. Indeed it was not until almost the dawn of the Nineteenth Century (R. 28) that Russia took any active interest in Alaska. In any event neither the present record nor recorded history show any indication whatever of Russian participation in the tacit understanding among its European neighbors.

Then too, by the time Russia finally did take over Alaska at least two centuries had gone by since the golden age of European exploration, and during that period the international attitude toward discovery had changed appreciably—

“In the early days of European exploration it was held, or at least every state maintained with respect

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was, in its inception, a Roman Catholic creation” as “it must be remembered that prior to the Act of Supremacy by Henry VIII in 1534 *all of the maritime powers* of Europe belonged to that faith” (italics supplied). It is well within the judicial knowledge of this Court that Russia, for centuries a stronghold of the Orthodox Greek Church, was never a Roman Catholic power.

to territories discovered by itself, that the discovery of previously unknown land conferred an absolute title to it upon the state by whose agents the discovery was made. But it has now been long settled that **the bare fact of discovery is an insufficient ground of proprietary right.** It is only so far useful that it gives additional value to acts in themselves doubtful or inadequate." Treatise on International Law, W. E. Hall, 5th Ed. (1904), page 101.

This gradual evolution—and contraction—of the so-called doctrine of discovery finds ample confirmation in the authorities, as for example in the following quotation from "Mr. Upshur, Sec. of State, to Mr. Everett, Oct. 9, 1843, M.S. Inst. Great Britain, XV, 148, 149" as re-quoted in John Bassett Moore's classic International Law Digest, Vol. I, page 259 —

"How far the mere discovery of a territory which is either unsettled or settled only by savages, gives a right to it, is a question which neither the law nor the usages of nations has yet definitely settled. The opinions of mankind, upon this point, have undergone very great changes with the progress of knowledge and civilization. Yet it will scarcely be denied that rights acquired by the general consent of civilized nations, even under the erroneous views of an unenlightened age, are protected against the changes of opinion resulting merely from the more liberal, or the more just views of after times. The right of nations to countries **discovered in the sixteenth century** is to be determined by the law of nations as understood *at that time*, and not by the improved and more enlightened opinion of three centuries later." (Italics as in the original; black face type emphasis supplied.)

In order to keep the length of this brief within reasonable bounds we must content ourselves with only one further quotation in this field. The following from *The Law of Nations in Time of Peace* (1861) by Sir Travers Twiss is of interest on more than one aspect of our own inquiry. After referring in Secs. 115-116 to the rights of

“property” and “legal possession” arising from discovery and occupancy he continues in Sec. 117—

“The principles applicable to such questions were discussed by the Commissioners of the United States of America, in the negotiations with the Commissioners of Spain, on the subject of the Western boundary of Louisiana. The principles, they observe, which are applicable to the case, are such as are dictated by reason, and have been adopted in practice by European Nations in the discoveries and acquisitions which they have respectively made in the New World. The first of these is that, when any European Nation takes possession of any extent of seacoast, that possession is understood as extending into the interior Country, to the sources of the rivers emptying within that coast, to all their branches, and the country they cover, and to give it a right in exclusion of all other Nations to the same.” (Italics as in the original.)

We digress for just a moment to remind the Court not only that the findings offer no suggestion that the Russians ever “discovered” even the coast of Prince of Wales Island on which the area here in question is located (cf. paragraph 15 at R. 29-30), and that the evidence already taken indicates affirmatively to the contrary (Tr. 46-47).

It is only fair to assume that Chief Justice Marshall knew exactly what he was doing at page 572 of his opinion in *Johnson v. McIntosh*, *supra*, when he timed the tacit agreement among the great nations of Europe as having occurred “on the discovery of this immense continent” —long before the Russian advent in Alaska.

Be that as it may, however, the fact is clear that up to 1867 when Imperial Russia ceded Alaska to the United States aboriginal Indian ownership in *Tlingit* Alaska, in which alone we are presently interested (see especially paragraphs 7 and 12 of the findings of fact at R. 27, 28) had undergone no impairment.

*The opinion below.*

The decision below should be reversed because it is essentially bottomed on an erroneous conclusion of law that petitioner's "interest in the lands prior to the treaty of 1867 was original Indian title" (R. 32). The fundamental error of such a conclusion has, we trust, been amply demonstrated in the preceding pages. It is also interesting to note that not having been advanced as a defense by the Government, that theory was introduced into the case wholly on the Court's own initiative, and that in its effort to refute our position its opinion offered only two suggestions—both of which are demonstrably erroneous. One is an error of commission, the other an even more startling one of omission.

It is most significant that in a rather sizeable opinion the only reasoning which purports to support that conclusion should have to be based in its turn on an absolutely false premise. Beginning about ten lines from the bottom of R. 18 the whole crux of that reasoning is refutation of a claim attributed to petitioner to the effect that its aboriginal ownership "was recognized" by the Russian sovereign and thereby given the legal status of full and complete ownership. We agree with the opinion as it goes on to say that the court thinks that "that asserted historical fact" has not been proved, and so on. But the trouble with that line of reasoning is that petitioner has never at any time made any such assertion, and naturally was not interested in any attempt to prove it. An exhaustive examination of those pages of either of our briefs below which dealt with the Russian aspect of the matter reveals no use of the word "recognize" or any equivalent thereof. *The setting up of such a straw man so that it can be knocked down stands almost as self-confessed inability to dispose of our case in any other way.* Our argument below was substantially the same as that in this brief to the effect that petitioner's ownership had continued "unimpaired" under Russian sovereignty. The same cases

were cited, except that it would seem appropriate to note at this point the following quotation which both in our brief below and in this brief appears more fully in another connection—

“That by the law of nations, the inhabitants, citizens or subjects of a conquered \* \* \* country, territory, or province, retain all the rights of property which have not been taken from them by the orders of the Conqueror, \* \* \* and remain under their former laws until they have been changed.” (*Mitchell v. United States*, 9 Pet. 711, 731.)

We are not interested in what the Russian Government could have taken if it wanted (see R. 19), or in what it may have taken elsewhere in Alaska. We are interested only in a *Tlingit* area which it did not take.

In our briefs below there were cited or quoted at substantially the same length as in this Point I and in Point II and III of this brief some twelve decisions of this Court other than the *Tillamooks* case, *supra*. All of those cases are in point and, we submit, many of them are controlling. But not one was cited or even mentioned in the opinion below. Not even *Johnson v. McIntosh*, although most of nearly two hours of argument and reargument in open court was devoted to consideration of that one case. An omission of that sort can not be explained away. *Avoidance on such a scale again can mean nothing less than a confession of inability to meet and answer petitioner's argument.*

### *Summary.*

And so we come to the end of Russian sovereignty and to the 1867 treaty with petitioner's full ownership still unimpaired.

**II. The 1867 Treaty of Cession had no legal effect one way or the other upon petitioner's interest in its lands, irrespective of what may have been the nature or extent of that interest, and under American sovereignty from 1867 to 1951 there was no impairment thereof by our government.**

*Distinction between sovereignty and title.*

Basic to this whole case, and particularly to this aspect of it, is the essential distinction between sovereignty and title as the latter term is ordinarily used to signify the immediate and direct proprietary ownership of the soil. For example, the United States exercises sovereignty over all four corners of 17th Street and Pennsylvania Avenue, N. W., but it owns and has title to only two of them. The building in which this case was tried and decided below falls within the category which an eminent authority who has already been quoted describes as "land and buildings in which the immediate as well as the ultimate property is in the hands of the state." (International Law, W. E. Hall, 5th Ed., page 419). Cf. *Johnson v. McIntosh*, 8 Wheat. 543, 548; *United States v. California*, 332 U. S. 19; *United States v. Texas*, 339 U. S. 707; *Alabama v. Texas*, 347 U. S. 272).

Treaties of purchase and cession are a familiar concept in both international law and American history. By their very nature they have to do primarily with sovereignty rather than with title, and that is equally true of the purchase and cession of territory occupied by Indians.

Thus, under the famous Louisiana Purchase Treaty of 1803 we acquired sovereignty over a vast territory, but, as we have learned in the preceding pages we inherited as an incident of that sovereignty only an exclusive right to purchase or otherwise acquire whatever was needed to complete our full title to the soil. And that full title to the soil of the "public lands" which were homesteaded to a later generation was in turn perfected only by a series of subsequent purchases from its Indian *owners* of that which



is now known as their "original Indian title". For example, in what is now Iowa 9000 square miles were thus acquired under the Black Hawk Treaty of 1832 (Encyclopedia Britannica, 11th Ed., Vol. 14, page 735; 7 Stat. 374). In what is now Missouri the Indian title to two thirds of the state had been acquired by 1808, and the title to the rest of the state was cleared by the Shawnee Treaty of 1825 (id., Vol. 18, p. 613; 7 Stat. 284). In what is now Minnesota, the Indian titles east of the Mississippi were acquired under the Chippewa and Sioux Treaties of 1837, and under two Sioux Treaties of 1851 most of the land west of the Mississippi was acquired (id., Vol. 18, pp. 552-573; 7 Stat. 536, 538). And so on. In the same way we acquired sovereignty over Florida under the Florida Purchase Treaty of 1819. But it was not until 1832 and 1833 that the Seminoles exchanged their lands for equal areas in the West (id., Vol. 10, p. 545; 7 Stat. 368, 423). The Report of the Commissioner of Indian Affairs for 1872 recites a total of 372 such purchases and acquisitions of Indian title to the soil as having been negotiated up to that time.

### *The Treaty of 1867.*

The Alaska Purchase of 1867 was not substantially different from the earlier purchases of Louisiana or Florida or California. The treaty clearly transferred all Russian sovereignty, together with "all real property belonging to the Government". Its full text is reported at 15 Stat. 539, is incorporated by reference in paragraph 18 of the findings of fact at R. 31, and is printed in the Appendix at page 64, *infra*. It contains no express reference to Indian possessions, but neither does it afford any basis for torturing its language to make out that Russia ever purported to sell something which it did not own, nor has respondent ever so claimed.

*Controlling decisions of this court.*

For that matter Russia could not have done so even had it tried. This Court in *United States v. Percheman*, 7 Pet. 51, 87, and *Strother v. Lucas*, 12 Pet. 410, 438, had long since declared unequivocally that

“In following the course of the law of nations, this court has declared that even in cases of conquest, the conqueror does no more than displace the sovereign, and assume dominion over the country. [cases cited.] A cession of territory is never understood to be a cession of the property of the inhabitants. The king cedes only that which belongs to him \* \* \* .”

Even earlier in *Soulard v. United States*, 4 Pet. 511, 512-513, a case involving titles in the Territory acquired under the Louisiana Purchase Treaty in which the United States had “stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property”, this Court had very pertinently noted that

“The United States, as a just nation, regards this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract.

“The term ‘property’, as applied to lands comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory; as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away”.

And of special interest in connection with paragraphs 10-14 of the findings at R. 28-29 is a later paragraph of the same opinion—

“The edicts of the preceding governments in relation to the ceded territory; the power given to the governors, whether expressed in their commissions, or in

special instruction; and the powers conferred on and exercised by the deputy governors, and other inferior officers, who may have been authorized to allow the inception of title; are all material to a correct decision of the cases now before the Court, and which may come before it."

In *Mitchell v. United States*, 9 Pet. 711, 731, an Indian case, there were set out in even greater detail—

"some general results of former adjudications which are applicable to this case, are definitely settled, so far as the power of this court can do it, and must be taken to be the rules of its judgment. They are these:—

"That by the law of nations, **the inhabitants**, citizens, or subjects **of a conquered or ceded country**, territory or province, **retain all the rights of property which have not been taken from them** by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, **and remain under their former laws until they shall be changed.**

"That a treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee \* \* \*."

All of which is in full conformity with those great fundamentals declared at page 746 of the same opinion that

"Indian \* \* \* hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals."

Thus it came about that in 1867, *after* Russia had ceded Alaska to the United States, petitioner came under American sovereignty with its original ownership of its lands still unimpaired.

*The opinion below.*

If we seem to digress from the orderly presentation of the legal aspects of petitioner's chain of title by stopping to discuss the opinion below before passing on to consideration of the American era in Alaska, it is only because this section of this Point is so closely tied in with and is almost a part of the immediately preceding section about the controlling decisions of this Court.

That opinion at the middle of R. 19 first refers to the possible effect of the treaty, passes the question for the moment, picks it up again near the top of R. 20, devotes to it the equivalent of practically three printed pages of the record through R. 22, and then near the bottom of the latter page notes inconclusively that "we do not resolve [that question]".

In view of its "answers to other questions" its failure to rule on this one was proper enough procedurally—even though based on a wholly erroneous conception of the law of those other questions. But we cannot let pass without comment the amazing nature of its discussion of the point. Frankly, we cannot understand how it could say so much without saying something more. True we did criticize at length the *Miller* case cited by the Government and we have no criticism of what is said about the confusion to which that case has given rise. But we did something more too. In our principal brief we cited *and quoted at substantially the same length as in this Point* all four controlling decisions of *this Court* which we have just briefed on the immediately preceding pages. But not one was even referred to in the three page discussion at R. 20-22.

*The American era.*

Whatever may have been the potential governmental power of the United States to extinguish petitioner's ownership either by *force majeure* or by amicable negotiation, the simple fact remains that there has been no such

overall taking or extinguishment. Nor could there have been, for again irrespective of the potential nature or extent of that power there is no question that it could have been exercised only by Congress or under its specific authorization. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 585.

Congress has taken no such action of either sort. On the contrary, what little legislation there has been in this general field all trends in just the opposite direction, as is indeed most pointedly suggested in the opening words of the very Act of August 8, 1947, under which the Timber Sale Agreement which gives rise to the case at bar was authorized—

“That ‘possessory rights’ as used in this resolution shall mean all rights, if any should exist, which are based on aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes \* \* \*” (61 Stat. 920).

It is common knowledge that from the time of its acquisition in 1867 until 1884 Alaska was almost completely neglected by Congress. It did not become a Territory until 1912, but the so-called Organic Act of May 17, 1884, 23 Stat. 24, established a District of Alaska, and also included a proviso—

“That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.”

The other statutes\* cited in the excerpt from the Act of August 8, 1947, quoted in the preceding paragraph are

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\* All of these enactments are further considered in Point III *post*.

to much the same effect, and then there is a gap of nearly half a century until the passage of the above quoted Act of August 8, 1947.

It is true that section 3(b) of that Act expressly disclaims either denial or recognition of the validity of any particular claim such as that here in suit. But the very fact of its enactment at all—authorizing as it does the sale of timber notwithstanding any such claim of “possessory rights”, and requiring in section 3(a) that all proceeds from such a sale be held in a special account in the Treasury “until the rights to the \* \* \* timber are finally determined”—cannot be construed otherwise than as an unusually specific Congressional recognition that in any event there has been under American sovereignty no overall or large scale extinguishment of such “rights”. And any small takings of a few acres here or there, and presumably under authority of law, have been so infrequent as to be of practically negligible importance in the present connection.\*

### *Summary.*

It thus appears that, with possibly negligible exceptions such as just noted, petitioner’s aboriginal ownership of the entire area covered by the Timber Sale Agreement has never been extinguished, but on the contrary has remained unimpaired under Russian sovereignty, under the 1867

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\* In any event the details as to the locations and acreage covered by any such takings are peculiarly within the knowledge of respondent, and petitioner is entirely willing that for purposes of the present case the total area described in paragraph 8 of the recommended findings be reduced in accordance with any such information which respondent may care to submit in due course. (Such fragmentary information as is available to petitioner indicates as the probable extent of such takings of forest lands only two patents (Nos. 595,956 near Lake Bay and 890,760 near Red Bay) and a few lighthouse reservations at Bushy Island (Executive Order 3406), Point Colpoys (Executive Order 3406), Point McNamara (Executive Order 4257), Kindergarten Point, Viehneffsky Rock, and Bluff Island). There are no townsites or improved plots within the area here in suit.

Treaty of Cession, and under American sovereignty until the 1951 partial taking which gives rise to this case.

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*Administrative confirmation of our case.*

Because what we are about to discuss does not involve administrative interpretation of an ambiguous statute and hence may not actually rise to the full dignity of argument, and also because it does not relate exclusively to Points I and II, we have not included it in the main body of this Point preceding the Summary on this page. But because it does show that what has just naturally had to happen over the years in the normal every day conduct of the public business by those charged with primary administrative responsibility as to Alaska at the same time strongly confirms our own thinking in these two Points I and II—as well as in some of the pages to which we are coming—we know of no better place in which to record it.

Seldom indeed has a plaintiff come into the Court of Claims with such ample support of its position at all administrative levels. For in addition to such general statements as those of the President of the United States and the Governor of Alaska already quoted at pages 7-9 of our Petition for Certiorari—not to speak of Secs. 1 and 3(a) of the Act of August 8, 1947, already quoted in full at pages 2-3, *supra*, all of which show very express recognition of the seriousness of these questions, there will now be cited instance after instance of specific administrative action which in turn offers specific confirmation of the case presented in this brief.

*Solicitor's Opinion M. 31634.*

This opinion is quite long. It is reported at 47 I.D. 461, but will also be found printed in full at pages 415-426 of Plaintiff's Exhibit 12 (R. 8). Without necessarily committing ourselves as to all its details we commend it to the at-



tention of the Court, but our special interest is in its approval on February 13, 1942, by the Secretary of the Interior (id., page 426) which made it also the administrative action of that high official of respondent. In fact it constitutes almost triple administrative action. For more than three years later on July 27, 1945, and again on January 11, 1946, the Secretary of the Interior in administrative decisions expressly reaffirmed it (id., pages 434, 449, 452).

The question involved as stated in its opening paragraph (id., page 415) was the same as here, except that it happened to relate primarily to submerged lands—

“Whether Indians of Alaska have any fishing rights which are violated by control of particular trap sites by non-Indians \* \* \*

The answer (id., pages 415, 425) is squarely to the point—

“I am of the opinion that this question must be answered in the affirmative. \* \* \*

**“I conclude that aboriginal occupancy establishes possessory rights in Alaskan waters and submerged lands, and that such rights have not been extinguished by any treaty, statute, or administrative action.”**

*The Hydaburg, Klawock, and Kake claims.*

For one reason or another certain limited powers to adjudicate Alaskan Indian claims which from time to time have been conferred upon the Secretary of the Interior have been very sparingly exercised. In 1945, however, the so-called Hanna hearings were held on the claims of the Indians of Hydaburg, Klawock, and Kake to areas near to, and in some instances immediately adjoining, this petitioner's area. The report, findings of fact, conclusions of law, and recommendations of R. H. Hanna, the Presiding Chairman, are printed in full at pages 426-433 of Plaintiff's Exhibit 12, and the administrative action of the Secretary of the Interior thereon is likewise printed in full at pages 434-453.

By and large his action squarely supports the position taken throughout this brief, although again we cannot fully acquiesce in certain incidental details as to which we reserve the right to present a different view at the appropriate time and place, as for example in our Point IV, *infra*. With this reservation we quote the concluding paragraphs of the Secretary's opinion of July 27, 1945 (*id.*, page 449)—

"A careful study of the cases and statutes confirms the basic conclusions of Solicitor's Opinion M. 31634: That submerged lands in Alaska are susceptible to such claims of aboriginal possession as were recognized by the act of May 17, 1884, and by subsequent legislation of the same tenor; that such rights, whatever they may be, have not been destroyed by the course of congressional legislation since 1884; and that whether such rights have been abandoned or otherwise extinguished or whether they still exist as valid rights today is entirely a question of fact to be decided on the available evidence in each particular case.

#### "CONCLUSION

"It is the duty of this Department to respect existing rights in disposing of the Federal public domain. This is true whether the public domain is land or water or a mixture of both, and whether the existing rights were established under Spanish, Mexican, Hawaiian, Danish, Choctaw, or **Tlingit law**. It makes no difference whether the evidence of such rights is found in papers sealed and notarized or in custom and the fact of possession, which is older than seals and notaries. Having attempted to discover the exact facts in these cases, the Department will govern its future actions accordingly. It will recognize that **the natives involved in these proceedings are entitled to the exclusive possession of approximately 190 acres per capita of land on which they live and which has remained in their possession since before our sovereignty attached**. It will continue to recognize that these natives have certain rights of user in other public lands, protected but limited by our conservation laws. It will take the position that all

public lands in which Indian exclusive possession has been extinguished are hence forth open to settlement and disposal, and that whatever loss has been suffered by these Indians through such extinguishment is to be remedied by appropriate action in the Court of Claims. Such action has been authorized by a liberal Congress solicitous of our national honor and of our obligations to a brave and industrious people who are making a resolute endeavor to meet the problems of the white man's civilization. The Indians of Alaska have every reason to expect that the Congress and the Department will be equally solicitous to respect their rights in the land they have thus far retained for their own use, and that if the public interest should now or hereafter require that any of these retained lands be withdrawn from Indian ownership this will be done only under appropriate legislation which assures adequate compensation for that which is taken from them in the interests of a wider public."

Of more than mere passing interest is the term by which the Secretary of the Interior refers to the Indians in his supplemental opinion of January 11, 1946, (id., page 452) dealing with the tail-hold, storage, etc., areas required on the shore in connection with large commercial fish traps—

"All such areas may, of course, be utilized by non-natives, but only with the consent of **the owners of the soil.**"

*The Goldschmidt-Haas Report.*

Next in point of time comes this official Report to the Commissioner of Indian Affairs, dated October 3, 1946, and dealing with the Possessory Rights of the Natives of Southeastern Alaska. A substantial part of this Report is in evidence in this case as Defendant's Exhibit 6 (R. 9). Again, we can not acquiesce in all of either its assumptions of law or its allegations of fact (cf. especially our express reservation of rights at R. 9). But again, its overall approach to the subject by and large confirms our whole basic position in this brief, as indeed could scarcely be otherwise in a technical report of this sort, representing

as it did the joint efforts of Agriculture's Anthropologist and Interior's Chief Counsel of the Office of Indian Affairs.

In particular we call attention to page iv and to Chart 11. We quote in part the Summary on page iv (from which we have already quoted more fully at page 10 of this brief)--

"The Tlingit and Haida Indians have continuously used and occupied the lands and waters of Southeastern Alaska since before the first exploration in the area. They used all the bays, inlets, islands, and streams from a little south of the mouth of the Copper River to the southern tip of Alaska. Without knowledge of writing, hard metals or machinery, they developed one of the highest forms of civilization in aboriginal America north of Mexico. It was rich in ceremony and creative arts, and complex in its social, legal and political systems. \* \* \*

"The natives had a well-defined system of property ownership which was not unlike our own, except that the land was generally held in the name of a clan or house group, with joint usage by such an extended family. Title to land was obtained by inheritance or as legal settlement for damages; it was never bought or sold. It was recorded in the minds of all interested parties by elaborate ceremonials and the distribution of goods among the people (potlatches), which were necessary before land ownership could be recognized. Deeds were sometimes further recorded in the carvings of the famous totem poles."

And on Chart 11 will be noted the highly significant sub-title indicating that the Chart shows what is admittedly—and correctly—characterized as "aboriginal use and **ownership**" of the Wrangell territory. Also, that it expressly indicates at least six areas of such "aboriginal use and ownership" as having been "Tihitan".

#### *The Hydaburg Reservation.*

Most recent in this series is the order of a later Secretary of the Interior, dated November 30, 1949, in which a

neighboring area on Prince of Wales Island was set aside as a reservation.

The present significance of this Order is that it was expressly issued—

“Pursuant to the authority vested in the Secretary of Interior by Section 2 of the Act of May 1, 1936 (49 Stat. 1250, 48 U.S.C., 1946 ed., sec. 358 a) \* \* \*.”

The very issuance of the order implied full administrative recognition of Indian rights in the land, as Section 2 of the 1936 Act authorized designation as such a reservation only—

“of any area of land which has been reserved for the use and occupancy of Indians or Eskimos by Section 8 of the Act of May 17, 1884, (23 Stat. 26), or by Section 14 or Section 15 of the Act of March 3, 1891 (26 Stat. 1101) \* \* \*.”

The fact of administrative recognition in which we are presently interested is not affected by the subsequent setting aside of this order in *United States v. Libby*, 107 F. Supp. 697.

### **III. The Acts of 1884 and 1900 recognized and confirmed petitioner's aboriginal ownership and at the same time independently created a new and coexisting right of full proprietary ownership.**

#### *Issues 3 and 4.*

This Point deals with a pair of issues so similar as to be readily arguable together as one—

“3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat. 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it?

“4. What such rights, if any, would have inured to it under the Act of June 6, 1900, 31 Stat. 321, 330, in the area, if any, which on that date was so used or occupied by it?” (R. 7.)

### *Introductory.*

The several possible sources from which there might have been derived so-called "possessory rights" of a kind subject to such a taking as here sued upon were quite formally enumerated by Congress in the very legislation under the authority of which the instant Timber Sale Agreement was expressly executed. Act of August 8, 1947 (printed in full at pages 2-3, *supra*).

Section 1 of that Act defined "possessory rights" as meaning

"all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), \* \* \*."

As already developed in Points I and II, full proprietary ownership stems directly from aboriginal occupancy or title, and thus falls squarely within the four corners of that definition. But in addition the possibility of at least two other approaches has been suggested. One would be by way of what by 1947 had become so well known as "original Indian title", which in turn also derives from aboriginal occupancy or title but the potentialities of which have been so misconstrued by the court below, all as more fully developed elsewhere in this brief (see pages 57 to 62, *infra*). The other would be by way of whatever new forms of statutory rights had been created by the Act of May 17, 1884, or the subsequent cited Acts. This latter approach will now be more fully explored under this Point. If petitioner qualifies under the terms of either act that legislation would clearly and independently establish full proprietary ownership of the entire area.

### *Text of the Acts.*

As already set forth at R. 23, section 8 of the Act of May 17, 1884, entitled "An Act providing a civil government for Alaska," 23 Stat. 24, 26, provided

“That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.”

Section 14 of the Act of March 3, 1891, entitled “An Act to repeal timber-culture laws \* \* \*,” 26 Stat. 1095, 1101, is of little import in the present connection for it did not even purport to create any new rights.

But the third of the cited statutes is on the contrary along lines similar to the first one. Section 27 of the Act of June 6, 1900, entitled “An Act making further provision for a civil government for Alaska \* \* \*,” 31 Stat. 321, 330, reenacted as of that date the principal terms of the earlier Act in an even more simple form that

“The Indians \* \* \* shall not be disturbed in the possession of any land **now** actually in their use or occupation.”

### *Construction and application.*

Although determination of whether any of these statutory conditions of use or occupation or claiming in 1884, or of use or occupation sixteen years later in 1900, were satisfied by petitioner is reserved for further proceedings under Rule 38(b) of the court below, a prima facie case has already been established at Tr. 18-34, 41-46, 87-90. But the question immediately before this Court is only the legal one as to what rights, if any, would have inured to petitioner if it is found to have satisfied any of those conditions. Issues 3 and 4 as stated at R. 7.

Neither statute is ambiguous or difficult to construe or apply. Together they run almost the entire gamut of terms ordinarily used with respect to real property—“possession,” “use,” “occupation,” “claimed,” “title.” The reference to further legislation is omitted in 1900, and was just as needless in 1884. For in both “possession” is



the key word. For it is "possession"—irrespective of whether of aboriginal origin or more currently acquired under the other conditions of the statute itself—which is the true subject of both. It is "possession" by the Indians which is not to be disturbed. And that term when so used in an Act of Congress is indeed a word of art. It had already been judicially construed by this Court, and must be presumed to have been used by Congress in the sense in which it had been so construed. *United States v. Arredondo*, 6 Pet. 691, 743; *Kepner v. United States*, 195 U. S. 100, 124.

The *Arredondo* case arose under the Treaty of 1819 whereby we acquired Florida from Spain. The inviolability of property rights in ceded territory which has just been considered under Point II was assumed as a matter of course. But the question was presented as to whether the words "in possession of the lands", in the 8th article of the Treaty required actual occupancy. In ruling in the negative this Court emphasized that "possession" and "occupation" are not synonymous, but on the contrary are distinct legal concepts,\* and that use of the former in legal parlance necessarily implies full and complete ownership—

"The law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title; this seisin and possession is coextensive with his right, and continues until he is ousted therefrom by an actual adverse possession. This is a settled principle of the common law, recognized and adopted by this court in [five cases cited], and is not now to be questioned.

"This gives to the words 'in possession of lands' their well settled and fixed meaning; **possession does not imply occupation or residence; had it been so in-**

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\* It is interesting to note that in a recent original Indian title case this Court definitely recognized this identically same distinction obtaining with respect to aboriginal Indian law: "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." *United States v. Santa Fe Pacific Railroad Co.*, 314 U. S. 339, 345.

tended, we might presume they would have been used. By adopting words of known legal import the grantors must be presumed to have used them in that sense, and to have so intended them; to depart from this rule would be to overturn established principles."

In the *Kepler* case this Court reiterated with special reference to legislation by Congress that—

"It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. The *Abbotsford*, 98 U. S. 440."

To the same inevitable effect are the dictionary definitions. We refer the Court to such pertinent excerpts from those definitions (*Funk & Wagnalls New Standard Dictionary*) as—

"possess \* \* \* 1. To have the **ownership** with the control and enjoyment of; have as a property or attribute; **own**; as, to *possess* a house, a family, or a conscience. \* \* \*"

"possession \* \* \* 4. Law. (1) The exercise of such a power over a thing as attaches to lawful **ownership**; the detention or enjoyment of a thing by a man himself, or by another in his name; the condition under which one may exercise power over a thing at pleasure, to the exclusion of all others; especially, the exercise of exclusive dominion over land. \* \* \*"

"dominion \* \* \* 2. The right of absolute possession and use; **ownership**; power of disposal."

Webster is to substantially the same effect.

*The opinion below.*

That opinion avoided any serious consideration of this branch of the case by the simple device of quoting in full the relatively longer Act of August 8, 1947, and then easing into a comment devoted primarily to the latter. R. 22-25.

It conspicuously ignored any mention of either *Arredondo* or *Kepner*, both of which had been briefed and quoted to the court below to exactly the same length as in this Point.

*Preview of evidence.*

Presentation of evidence as to the details of use and occupation and claiming in 1884 and 1900 is, of course, reserved for further proceedings which we hope will be required by remand of this case. But a brief preview of some of the official documentary evidence which we look forward to offering at that stage should also prove enlightening in the present connection. Unfortunately the Censuses of 1880 and 1900 are very incomplete and fragmentary with respect to Alaska and especially so with respect to its Indians. But surprising as it may seem the Census of 1890 which falls right in between our two critical dates abounds with helpful detail. In particular it specifies not only petitioner's permanent village at Wrangell (population 316) and also deals separately with three of the key spots in the clan's Prince of Wales Island area: Lake Bay (population 31, of whom 28 were Indians, number of houses 12); Salmon Bay (population 42 of whom 41 were Indians, number of houses 16); and Red Bay (6 buildings but no one there at the time of the enumeration). The Report specifically referred to the fact that all three of those key fishing spots were completely vacated during the winter.\* (United States, 11th Census, 1890, Vol. 8, pages 29, 163; Bulletin No. 30, pages 5, 27.)

*Summary.*

Thus by this entirely different approach, and quite irrespective of aboriginal rights, the conclusion is independently required that, if petitioner is found to have either

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\* The enumeration made at least in part during the fishing season apparently recorded each Indian where it found him at the time in accordance with the customary cycle of Tlingit economy as already described at page 11, *supra*.

in 1884 or 1900 satisfied any one of the statutory conditions, the substantial possessory rights of undisturbed possession which thereby inured to it were to all intents and purposes legally equivalent to full proprietary ownership. Practically all *Tlingit* Indian occupancy or use in either of those years stemmed from aboriginal ownership of the same respective areas, so that the practical effect of these two Acts was recognition and confirmation of that ownership.

**IV. Petitioner's admittedly less intensive user of its area since the turn of the century does not constitute prima facie evidence of extinguishment or termination of its interest therein, whatever may have been the nature or extent of that interest.**

*Issue 5.*

Point IV deals with a question of common interest in connection with all three preceding Points as originally posed in issue 5—

“5. In the event a decision of an affirmative nature on any of issues 2, 3, or 4, is followed by evidence indicating specific property rights on the part of plaintiff at any of those times, then would the testimony of plaintiff's witness Paul as to recent less intensive use of the areas claimed by plaintiff (Tr. 13-14, 29-30, 44-45, 96-97) constitute prima facie evidence of termination or loss of such rights?” (R. 7.)

*The facts.*

Admittedly, petitioner's use of its ancestral Tee-hit-ton area has been less intensive since the turn of the century. The evidence referred to in issue 5 was in large part voluntarily introduced by it in its desire to facilitate prompt disposition of all issues that may lurk in the case.

That evidence is summarized in paragraph 17 of the findings of fact at R. 30-31—

"17. Small pox, hard liquor, and loose living decreased both the number of Tee-hit-ton and the authority of local clan officials over individuals. At about the turn of the century the clan had only one woman of child-bearing age. Since that time the clan has had 65 or fewer people. Because of this population decrease, and changes in the economic patterns brought about by such things as the use of powerboats for fishing, \* \* \* the Tee-hit-ton \* \* \* are and have been physically incapable of controlling or exploiting the area which was once the sole support of a larger number of people, particularly when significant amounts of time must be spent gaining a livelihood today under conditions which preclude extensive use either of small fishing streams or hunting areas."

The Court may care to read the original pages of the evidence at Tr. 13-14, 29-30, 44-45, 96-97, but for present purposes the summarized finding just quoted serves reasonably well.

*The law bearing on ordinary title.*

It is familiar law that title to real property can not be divested through mere inaction or indifference or even by abandonment. 73 C.J.S. 208-209; Thompson on Real Property, Vol. 5, Secs. 2565-2567; Tiederman on Real Property, Sec. 516; Tiffany on Real Property, 3rd Ed., Vol. 4, Sec. 965. To quote briefly a salient excerpt:

"In order to justify the conclusion that there has been an abandonment of property there must be some clear and unmistakable affirmative act indicating a purpose to repudiate the ownership thereof. It must be remembered that the intent to relinquish ownership is a material element in abandonment. In fact it is said to be the determining element on the issue of abandonment, \* \* \*. Mere non-user, or neglect to assert rights in a vested estate does not result in the loss of ownership thereof in the absence of adverse possession \* \* \*." (Thompson, Sec. 2566)

Or to sum it all up in a sentence :

“Failure to assert a valid title does not operate to extinguish it.” (Tiffany Sec. 965)

As this Court stated it in *United States v. Arredondo*, 6 Pet. 691, 743, legal possession

“continues until he is ousted therefrom by an actual adverse possession.”

*A fortiori* petitioner's possession and title could not have been divested when as here any inaction was merely the natural and inevitable result of changing economic conditions. And the finding here under consideration could not possibly constitute a *prima facie* case against petitioner, as it includes neither of the essential factors of intent or adverse possession.

*The law bearing on “original Indian title”.*

As already developed in Point I and further considered hereinafter in Point VI petitioner cannot acquiesce in the decision below that its interest in its ancestral area ever degenerated to the low estate of so-called “original Indian title”. But in the interests of a complete presentation of all possible aspects of this case it should be noted that this Court has definitely held that the same principles which have just been considered are equally applicable to that lesser degree of title. *United States v. Santa Fe Pacific Railroad Co.*, 314 U. S. 339, 354, 356, 357-358, frequently referred to as the *Walapai* case.

It is scarcely necessary to burden this brief with a detailed statement of the rather involved facts of that case which involved two different classifications of land, as to only one of which was the Indian claim sustained. The important thing at this point is that the same test of *intent* was applied to both aspects of the case—

“Nor was there any plain intent or agreement on the part of the Walapais to abandon their ancestral lands \* \* \*.”

“Certainly a forced abandonment of their ancestral lands was not a ‘voluntary cession’ \* \* \*

**“A few of them thereafter lived on the reservation; many of them did not. While suggestions recurred for the creation of a new and different reservation, this one was not abandoned. For a long time it remained unsurveyed. Cattlemen used it for grazing, and for some years the Walapais received little benefit from it. But in view of all the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by ‘voluntary cession’ within the meaning of § 2 of the Act of July 27, 1866.”**

To the same effect is a very apt summary of the law in an earlier opinion of the court below—and incidentally it may have been noted that this is our first citation of a case other than a decision of this Court and that up to this point all citations have been to its decisions. We quote from *Fort Berthold Indians v. United States*, 71 C. Cls. 308, 334—

“Beyond doubt, abandonment of claimed Indian territory by the Indians will extinguish Indian title. In this case the Government interposes the defense of abandonment, asserting that the facts sustain the contention. It is of course conceded that the issue of abandonment is one of intention to relinquish, surrender, and unreservedly give up all claims to title to the lands described in the treaty, and the source from which to arrive at such an intention is the facts and circumstances of the transaction involved. **Forcible ejection from the premises, or nonuser under certain circumstances, as well as lapse of time, are not standing alone sufficient to warrant an abandonment.** *Welsh v. Taylor*, 18 L. R. A. 535; *Gassert v. Noyes*, 44 Pacific 959; *Mitchell v. Corder*, 21 W. Va. 277.”



### *Summary.*

It follows therefore that irrespective of whether petitioner's property rights are established under Point I or under Point III, or even if it could be held to have nothing more than original Indian title, paragraph 5 of the issues which were on trial in this case should have been answered in the negative; the petitioner is as yet under no burden of going forward with evidence on this aspect of the case; and the court below erred in failing to so hold.

### **V. The appropriation of timber rights implicit in the execution of the timber sale agreement by respondent's agents on August 20, 1951, constituted as of that date a partial and compensable taking of any title or possessory rights that petitioner may establish.**

#### *Issue 6.*

This Point deals with original issue 6, which was in turn occasioned by paragraphs 13 and 14 of respondent's Third Defense in its Answer at R. 5 where it pleaded that this suit was premature because no timber had yet been cut. Issue 6 posed the following question—

“6. If any such property rights are established, and had not meanwhile been terminated or lost, then would the execution of the Timber Sale Agreement of August 20, 1951, (as admitted in paragraph 10 of defendant's Answer) constitute a compensable taking of such rights, or would it give rise to a right to an accounting within the jurisdiction of this Court, or both?”\* (R. 7.)

#### *The facts.*

This case involves what might be characterized as a horizontal rather than a vertical taking. No one section

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\*The second alternative has not yet been briefed or argued below and accordingly is not further discussed at this time. See the Second Count of our original Petition at R. 3.

of the timber sale area was taken outright, but the cream, i.e., the timber, was skimmed off the entire area. Even under our view of the case, petitioner admittedly would still have the use—and the unimpaired legal ownership—of the bare land itself, stripped however of its most valuable resource.\*

The full text of the Timber Sale Agreement is in the record as Plaintiff's Exhibit 4 and is incorporated by reference in paragraph 21 of the findings of fact at R. 31. In a word, the respondent acting under the express authority of the Act of August 8, 1947 (page 2, *supra*), agreed to sell to a pulp and paper company over a period extending to 2004 all the merchantable timber, estimated at 1,500,000,000 cubic feet, on an area which included part of the area claimed by plaintiff as its ancestral property.

### *Partial taking.*

Such a forced division of the total proprietary right with strangers is a partial taking which in turn is just as compensable and actionable as a complete taking. *Shoshone Tribe v. United States*, 299 U. S. 476, 497; *United States v. Peewee Coal Co.*, 341 U. S. 114, 117-118, 119, and cases there cited; *Gerlach Live Stock Co. v. United States*, 102 C. Cls. 392, 395.

In the *Shoshone* case the overall size of the reservation had not been reduced but the tribe had been forced to share it with other Indians. In a decision for the Indians this Court stated the law most succinctly that—

“The fact is unimportant that it was a partial taking only, and that eviction was not complete.”

The *Peewee* case dealt with a taking which was partial in that it was only temporary.

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\* Such timber is not merely valuable on its own account. Its depletion would inevitably spell a corresponding depletion in game and wild life.

The *Gerlach* case while not involving Indian lands nevertheless affords an exceptionally close and pertinent parallel. There as here the plaintiff's ownership of the land had not been impaired. The building of a dam up stream had, however, effected a taking of one of its natural resources; viz., natural irrigation through seasonal overflow of the river below the dam site. In overruling defendant's demurrer the Court of Claims held—

“Certainly [the Government] has not the right to take the water away from one man and sell it to another without compensating the man deprived of it. Plaintiff's riparian rights in this stream, if any, was a property right, of which it cannot be deprived without being paid just compensation.

“However, defendant says the plaintiff's land has not been taken, but has only been damaged by the destruction of its riparian rights, and that this court has jurisdiction only of a suit for a taking of land and not for damages to it. We do not think this is a suit for damages to land: it is one for the taking of a right plaintiff had to use the water of this river. This is a property right, for the taking of which the owner is entitled to just compensation. *Yates v. Milwaukee*, 10 Wallace 497, 504.”

So here, if petitioner had any property right in the land itself, as it unquestionably did, then—and wholly irrespective of the nature of that right—its corresponding rights in the timber growing thereon constitute a similar property right of which it cannot be thus deprived without being paid just compensation.

*Petitioner's compensable interest in the timber.*

If plaintiff's full proprietary ownership of its portion of the timber sale area is sustained in accordance with the preceding Points of this brief and with the evidence that may be adduced in a further proceeding, then there obviously can be no question as to its correspondingly full interest in the timber growing on that area.

And once again in the interests of complete presentation of all aspects of the case it is to be noted that the same conclusion would necessarily have to be reached even under original Indian title. For such title is an unrestricted right of occupancy, and if the right to use the waters of an adjoining river is property, *a fortiori* the even larger right to use and occupy the land must necessarily be property. But fortunately the precise issue with respect to such ownership of timber has been decided by this Court. *United States v. Shoshone Tribe*, 304 U.S. 111, 115-118; *United States v. Klamath Indians*, 304 U.S. 119, 123. In the *Shoshone* case the question arose with respect to a tribe which both by original Indian title and by treaty had a similar right to the "use and occupation" of the lands of its reservation. This Court ruled squarely at pages 117-118—

"Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. *Cherokee Nation v. Georgia*, 5 Pet. 1, 48. *Worcester v. Georgia*, supra, 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial. \* \* \*

"The lower court did not err in holding that the right of the Shoshone Tribe included the timber and minerals within the reservation."

To the same effect in the *Klamath* case it was on the same day ruled at page 123—

"The worth attributable to the timber was a part of the value of the land upon which it was standing. Plaintiffs were entitled to have that element of value included as part of the compensation for the lands taken. *United States v. Shoshone Tribe*, ante, p. 111."

*Accrual of cause of action.*

In paragraphs 13 and 14 of its Answer in this case (R. 5) respondent suggests that as it may be many years before there will be any actual cutting in the timber sale area petitioner's cause of action, if any, has not yet accrued.

Could anything be more fallacious? The very existence of the Timber Sale Agreement establishes the chief value of the area to have been its stand of marketable timber, and at the same time illustrates and confirms that the customary and ordinarily the only practical means of realizing such values on the part of the initial owner is through just such a sale of the timber rights for a period of years. Whether in entering into that Agreement the respondent was acting in the capacity of an all-wise Government solicitous for the social and economic welfare of Alaska as a whole, or merely in that of a self-assertive claimant to ownership of the soil, is immaterial. The fact remains that it did the conventional thing, and is in no position to even intimate that Indian owners who are no better able than the Government to cut and process commercial timber, and in no more favorable position to realize immediate cash from their holdings, should be relegated to a less practical course. The Indians' right to realize on their values in the accepted and conventional manner of negotiating a comparable agreement was completely taken from them on August 20, 1951, and it necessarily follows that their cause of action for that taking, accrued on that date.

But extensive *a priori* reasoning is scarcely necessary. For again the *Gerlach Live Stock Company* case affords an almost exact parallel, and again the reasoning and decision of the Court of Claims in its final opinion in that case are directly to the point. *Gerlach Live Stock Co. v. United States*, 111 C. Cls., 1, 82, 86-87, affirmed at 339 U. S. 725, 755. There as here

“defendant says that at any rate it has not as yet taken any rights from plaintiff.” (page 82.)

After further discussion of the facts and an eventual quotation from *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, which involved only a question as to whether or not there had been a taking at all and not as to when it had occurred, the Court of Claims continued at page 86—

“We think the reasoning behind this decision furnishes a guide for the determination of **the time of the taking**. That time, it would seem, **comes whenever the defendant's intent to take has been definitely asserted and it begins to carry out that intent**. So long as it is conjectural whether or not defendant will actually take plaintiff's property, a taking has not occurred, but when conjecture ripens into a definitely asserted purpose and steps are taken to carry out that purpose, the taking may be said to have occurred.

“In the case at bar there can be no doubt that the defendant intended to deprive plaintiffs of whatever water rights they had in their lands. This is evidenced by a number of things. The construction of the dam, which would result in the deprivation of plaintiff's rights, had been begun on November 3, 1939, a considerable time prior to October 20, 1941. In the 23 days following that date a considerable body of water had been impounded in the pool behind the dam, and construction was continuing insofar as materials could be obtained.

“Not only that, but defendant had paid for many of the rights they intended to take. They had entered into an agreement with Miller & Lux to pay them something like two and a half million dollars for the taking of water rights, some of which were appurtenant to lands riparian to this river, including plaintiff's lands. There can be no doubt on the record that defendant's intention to take plaintiff's rights had been clearly demonstrated and that it was in the process of carrying out that intention.

“We have no doubt that a taking had occurred not later than October 20, 1941. **Certainly by that time defendant had brought about a decrease in the value of plaintiffs' lands.** With the imminent prospect of

their being deprived of any further rights to the flood waters of this river, they could not have sold them for their former value.

"We hold that the taking of plaintiff's water rights occurred not later than October 20, 1941."

Here the execution of the Agreement definitely fixed August 20, 1951, as both the date when "the [respondent's] intent to take has been definitely asserted" and the time when "[respondent] had brought about a decrease in the value of [petitioner's] lands."

Indeed the Timber Sale Agreement, drafted and executed as it was by respondent's agents, is itself sufficient answer to respondent's claim on this point. The express provision of section 6 that

**"Title to all timber included in this agreement shall remain in the United States until it has been paid for, felled and scaled or measured."**

completely refutes any argument by respondent that it will not have taken title to petitioner's timber until it is cut—in some instances perhaps a generation or more hence.

**VI. Even if its decision that "original Indian title" obtained in Alaska could be sustained, the court below erred as to the consequences which it attributed to that premise.**

The court below held (1) that petitioner's interest had under Russian sovereignty been reduced to original Indian title and (2) that even if such an interest survived the treaty of 1867 it still "would not be a right on which a suit against the United States could be based". Petitioner again submits that on the contrary the only proper and sound disposition of this case is along the lines developed in the preceding pages, and this Point is a sort of anomaly in even referring to any other possibility. Let us make our position crystal clear that we do so only in deference to the proprieties which may call for at least some comment



on what seems to be such an essential part of the rationale of the opinion of the court below. And we do so without in the least qualifying our prime reliance upon our preceding Points which together lead to a result wholly inconsistent with the conclusion below and by the same token completely refute it.

But to get back to the opinion below, we have already shown how it made the wrong turn when at the very first fork it took off so blithely down the wrong road of original Indian title. But this Court should also be apprised—even if only briefly—as to how far and how frequently it wandered still further off even that wrong road.

### *Effect of the treaty of cession.*

First a word as to the effect of the cession of 1867. Even original Indian title would have survived the treaty of 1867. Indeed such a result as to this particular form of property is a necessary implication of a long line of decisions of this Court from *Soulard v. United States*, 4 Pet. 511, 512-513 (see quotation therefrom at page 31, *supra*) right on down to the recent and unanimous opinion in *United States v. Santa Fe Pacific Railroad Company*, 314 U. S. 339. In the latter case it is specifically so ruled at page 345 as to the Mexican cession, as still further explained in terms of general application at page 346—

“ \* \* \* Perhaps the assumption that aboriginal possession would be respected in the Mexican Cession was, like the generalizations in *Johnson v. McIntosh*, *supra*, not necessary for the narrow holding of the case. But such generalizations have been so often and so long repeated as respects land **under the prior sovereignty of the various European nations**, including Spain, that, like other rules governing titles to property (*United States v. Title Insurance & Trust Co.*, 265 U. S. 472-486-487) they should now be considered no longer open.”

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And irrespective of whether such title was "recognized" or "unrecognized" under the classification which has been sought to be developed in some of the opinions in this field, its taking under the circumstances of this case would be compensable.

*Recognized original Indian title.*

If petitioner's title had been "recognized" there is no question that as a matter of law it would be compensable. The opinion below so concedes at the top of R. 20. Cf. the *Tillamooks* case, 329 U. S. 40, 49, 57, and cases there cited. But then, having injected this new factor into the case, the opinion below stops short without directing any attention to the application of that principle even though the record here, and particularly the Acts of 1884 and 1900 (already fully set forth in Point III at pages 41-47, *supra*), furnish even stronger grounds for a holding of sufficient recognition than the 1848 Act upon which this very same court below had relied in its own opinion in the *Tillamooks* case. See 329 U. S. 40, 54, and 103 C. Cls. 494, 554. Indeed those Acts of 1884 and 1900 did the very thing referred to in the dissenting opinion in *Tillamooks* as necessary; they gave this petitioner its own area "as a place upon which to live". 329 U. S. 40, 57. And in the present instance the argument for "recognition", if any such an argument is necessary, is still further strengthened by the impounding provisions of the Act of August 8, 1947, quoted in full at page 3, *supra*, as well as in the opinion below at R. 23-24. Nor can the fact of the Government's own argument in its brief in *United States v. Libby, McNeill & Libby*, 107 F. Supp. 697 (1952), that

"All Congressional enactments concerning Alaskan Natives recognized their aboriginal rights. \* \* \* The Miller case to the contrary notwithstanding"

be undone by any subsequent repudiation by an Acting Assistant Attorney General for expressed reasons of expediency!

*Unrecognized original Indian title.*

If, despite all the argument of the preceding pages, this alleged aspect of this case is nevertheless reached, we submit that any such distinction as suggested by the opinion below is wholly illusory. *Shoshone* case 299 U. S. 476; 304 U. S. 92, 115, 117; *Tillamooks* case, 329 U. S. 40. Bearing in mind that "original Indian title" and "Indian right of occupancy" are commonly used as synonymous terms and were actually so used in the opinion below (R. 19), and that in *Shoshone* the original Indian title had even been "recognized" by treaty, the following excerpts from the last opinion in that case make it clear that this Court's decision was based on that right quite irrespective of whether it had or had not been recognized—

"In this case we have held, 299 U. S. 476, 484, that the tribe had the right of occupancy with all its beneficial incidents; that, the right of occupancy being the primary one and as sacred as the fee, division by the United States of the Shoshones' right with the Arapahoes was an appropriation of the land *pro tanto*; that although the United States always had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would be, not the exercise of guardianship or management, but confiscation.

\* \* \*

"Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. *Cherokee Nation v. Georgia*, 5 Pet. 1, 48. *Worcester v. Georgia*, supra, 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial. \* \* \*

Even more emphatic to that effect is the principal opinion in the *Tillamooks* case, 329 U. S. 40, where four of the prevailing majority joined in ruling at pages 51-52—

"Nor do other cases in this Court lend substance to the dichotomy of 'recognized' and 'unrecognized' Indian title which petitioner urges. Many cases recite the paramount power of Congress to extinguish the Indian right of occupancy by methods the justice of which 'is not open to inquiry in the courts' ". *United States v. Santa Fe Pacific R. Co.*, supra, at 347. Lacking a jurisdictional act permitting judicial inquiry, such language cannot be questioned where Indians are seeking payment for appropriated lands; but here in the 1935 statute Congress has authorized decision by the courts upon claims arising out of original Indian title. Furthermore, some cases speak of the unlimited power of Congress to deal with those Indian lands which are held by what petitioner would call 'recognized' title; yet it cannot be doubted that, given the consent of the United States to be sued, recovery may be had for an involuntary, uncompensated taking of 'recognized' title. 'Whether this tract . . . was properly called a reservation . . . or unceded Indian country, . . . is a matter of little moment . . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon.'"

We are not unmindful that the opinion below at R. 19 held that this considered opinion of four Justices of this Court had been overruled by what it concedes to be mere dictum in a later case which did not even deal with the compensability of Indian title and in which the reference to that subject was neither occasioned nor required by anything in the record or the briefs. We submit, however, that the court below went far beyond the bounds of its proper judicial function in its *ipse dixit* attributing such effect to mere dictum—and especially in dictum buried as this was in a long footnote which in turn related primarily to a still different subject. See 337 U. S. 106. In any event

we suggest that an issue of such vital importance in at least 400 other pending causes of action by Indians in continental United States (the Government gives that figure at page 9 of its Memorandum in answer to our Petition for Certiorari at October Term, 1953, No. 696) should not be disposed of in such cavalier fashion. We do not burden this brief with lengthy argument on a point which in our judgment will never be reached. But if perchance it is reached it might well be that an opportunity to brief and argue a question of such wide importance could be granted.

### CONCLUSION

Going back to issues 2-6 which are posed at R. 7, and which present the basic controversy submitted to this Court, petitioner submits that the judgment below should be reversed and the case remanded with directions

to answer issues 2, 3, and 4 to the effect that after the inception of American sovereignty petitioner's right in any area which it had up to then used or occupied in its accustomed Indian manner was one of full proprietary ownership, and that on May 17, 1884, or June 6, 1900, its right in any area so used or occupied on either of those dates (or claimed in 18-4) was similarly one of full proprietary ownership;

to answer issue 5 in the negative; and

to answer the first alternative of issue 6 in the affirmative.

Respectfully submitted,

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August 1954.

## APPENDIX

## Treaty With Russia

(15 Stat. 539)

*Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America; Concluded March 30, 1867; Ratified by the United States May 28, 1867; Exchanged June 20, 1867; Proclaimed by the United States June 20, 1867.*

## ARTICLE 1.

His Majesty the Emperor of all the Russias agrees to cede to the United States, by this convention, immediately upon the exchange of the ratifications thereof, all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit: The eastern limit is the line of demarcation between the Russian and the British possessions in North America, as established by the convention between Russia and Great Britain, of February 28-16, 1825, and described in Articles III and IV of said convention, in the following terms:

“Commencing from the southernmost point of the island called Prince of Wales Island, which point lies in the parallel of 54 degrees 40 minutes north latitude, and between the 131st and the 133d degree of west longitude, (meridian of Greenwich,) the said line shall ascend to the north along the channel called Portland channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude, (of the same meridian;) and finally, from the said point of intersection, the said meridian line of the 141st degree, in its prolongation as far as the Frozen ocean.

“IV. With reference to the line of demarcation laid down in the preceding article, it is understood—



"1st. That the island called Prince of Wales Island shall belong wholly to Russia," (now, by this cession, to the United States.)

"2d. That whenever the summit of the mountains which extend in a direction parallel to the coast from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude shall prove to be at the distance of more than ten marine leagues from the ocean, the limit between the British possessions and the line of coast which is to belong to Russia as above mentioned (that is to say, the limit to the possessions ceded by this convention) shall be formed by a line parallel to the winding of the coast, and which shall never exceed the distance of ten marine leagues therefrom."

The western limit within which the territories and dominion conveyed, are contained, passes through a point in Behring's straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern, or Ignalook, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly southwest through Behring's straits and Behring's sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; then, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper Island of the Kormandorski couplet or group in the North Pacific ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian.

## ARTICLE II.

In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. It is, however, understood and agreed, that the churches which have been built

in the ceded territory by the Russian government, shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship therein. Any government archives, papers and documents relative to the territory and dominion aforesaid, which may be now existing there, will be left in the possession of the agent of the United States; but an authenticated copy of such of them as may be required, will be, at all times, given by the United States to the Russian government, or to such Russian officers or subjects as they may apply for.

### ARTICLE III

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

### ARTICLE IV

His Majesty the Emperor of all the Russias shall appoint, with convenient despatch, an agent or agents for the purpose of formally delivering to a similar agent or agents appointed on behalf of the United States, the territory, dominion, property, dependencies and appurtenances which are ceded as above, and for doing any other act which may be necessary in regard thereto. But the cession, with the right of immediate possession, is nevertheless to be deemed complete and absolute on the exchange of ratifications, without waiting for such formal delivery.

### ARTICLE V.

Immediately after the exchange of the ratifications of this convention, any fortifications or military posts which may be in the ceded territory shall be delivered to the agent of the United States, and any Russian troops which may

be in the territory shall be withdrawn as soon as may be reasonably and conveniently practicable.

#### ARTICLE VI.

In consideration of the cession aforesaid, the United States agree to pay at the treasury in Washington, within ten months after the exchange of the ratifications of this convention, to the diplomatic representative or other agent of his Majesty the Emperor of all the Russias, duly authorized to receive the same, seven million two hundred thousand dollars in gold. The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.

#### ARTICLE VII.

When this convention shall have been duly ratified by the President of the United States, by and with the advice and consent of the Senate, on the one part, and on the other by his Majesty the Emperor of all the Russias, the ratifications shall be exchanged at Washington within three months from the date hereof, or sooner, if possible.

In faith whereof, the respective plenipotentiaries have signed this convention, and thereto affixed the seals of their arms.

Done at Washington, the thirtieth day of March, in the year of our Lord one thousand eight hundred and sixty-seven.

(L.S.) William H. Seward

(L.S.) Edouard De Stoeckl.

NOV 9 1954

HAROLD D. HART, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

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No. 43

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THE TEE-HIT-TON INDIANS, an identifiable group of  
Alaska Indians, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

---

## REPLY BRIEF FOR PETITIONER

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**REPLY BRIEF FOR PETITIONER**

---

This brief offers simply a page by page commentary on respondent's brief. Our comments will be grouped in the same sequence as that of the Points in our principal brief, but all page references to the Government's brief will be italicized.

By way of preview, it is fair to warn that in entirely too many instances the authorities cited but seldom quoted by respondent fall woefully short of supporting the categorical assertions to which they are appended.

## PETITIONER'S POINT I

The Government's corresponding Point I is wholly unresponsive. Devotion of almost thirty pages (*pp.* 13-31) to exclusive discussion of the stateside picture is no answer to the position summarized at page 7 of our brief (and fully developed at pages 14-28) that—

“The gist of our argument is that there are two major considerations which necessarily lead to an end result in *Tlingit* Alaska very different from the familiar stateside concept of ‘original Indian title’  
\* \* \*.

“One is that the historical, political, and legal background of Russian America was so fundamentally different from that of the forty-eight states of Continental United States that *Tlingit* aboriginal full proprietary ownership continued unimpaired throughout the entire period of Russian ownership.”

Begging the question on such a scale can serve only to muddy the waters and to confirm that the Government dare not venture to meet this issue squarely—as is only too apparent on even a cursory analysis of the relatively few pages which even purport to reply more directly to our contentions.

Specifically, its *pages* 32-33 offer merely an unsupported *ipse dixit* echo of the preceding pages and then go on to convey a distinctly wrong impression. The quotation from Senator Sumner's speech is bad enough. For the whole context of that speech shows that he was talking in terms of sovereignty and cession, and that the quoted sentence must be read in such a setting.

But it is the paragraph at the bottom of *page* 33 that is open to most serious exception—especially in its specific reference to the alleged “proprietary rights specified in this decree.” Little wonder that the Government studiously avoided any quotation from an edict which it boasts of as furnishing “conclusive” and “irrebuttable” support



for its position! For nowhere in either the Edict or the attached Rules is there any reference to rights of a proprietary nature, and the full text makes it plain that the Emperor was acting in the capacity of a sovereign rather than of a proprietary owner. In short it recites that smuggling was so rampant that specific regulation of a police nature had become necessary for both Alaska and Siberia, and that there are accordingly attached and promulgated some 63 Sections of extremely detailed "Rules established for the limits of navigation and order of communication along the coast of Eastern Siberia, the northwestern coast of America, and the Aleutian, Kurile, and other waters."\*

The only reference to discovery or occupation is in some correspondence during the following year, when the Russian Minister to the United States replied to a protest by the American Secretary of State against the "assertion of a **territorial claim** on the part of Russia, extending to the fifty-first degree of north latitude on this continent."\*\* In

---

\* The true scope of both the Edict and the Regulations is sufficiently evidenced in the opening sections of the latter—

"Sec. 1. The pursuits of commerce, whaling, and fishing, and of all other industry, on all islands, ports and gulfs, including the whole of the northwest coast of America, beginning from Behring's strait to the fifty-first degree of northern latitude, also from the Aleutian islands to the eastern coast of Siberia, as well as along the Kurile islands from Behring's strait to the south cape of the island of Urup, viz: to 45° 50' northern latitude, are exclusively granted to Russian subjects.

"Sec. 2. It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia, as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation, along with the whole cargo."

\*\* The "territorial claim" indicated in Sec. 1 ranged from a point just above the northern extremity of Vancouver Island (several hundred miles south of the present site of Prince Rupert, B. C.) in a great circle around to and well down into the islands of the Japanese archipelago.

the further course of that correspondence, the Secretary of State, in a second letter, went on to specifically assert as clear and indisputable—

**“The right of the citizens of the United States to hold commerce with the aboriginal natives of the northwest coast of America, without the territorial jurisdiction of other nations \* \* \*”.**

Among other things, the Russian Minister in his concluding letter referred to the 1799 Charter of the Russian American Company as simply—

**“conceding to the said Company a part of the sovereignty or rather certain exclusive privileges of commerce \* \* \*”.**

These quotations are offered to illustrate that the supplemental diplomatic correspondence as well as the Edict and Rules was pitched wholly at the level of territorial sovereignty rather than of proprietary ownership. Also that back in 1822 the present respondent did not recognize Russia as having acquired any rights of any sort as against the Tlingit. And even if some of the “pursuits of commerce, whaling, fishing, and of all other industry” be considered as proprietary rights, the Edict purports to take none of those rights away from the Indians, but, if anything, would appear to confirm those rights in the Indians and all other Russian subjects in the area covered by the Edict, as against all outsiders or foreigners. For to whatever extent the Indians may have been subject to the sovereign power of Russia, they were Russian subjects within the intent, meaning, and protection of the Edict. See definition of the noun, “subject”, Webster’s New International Dictionary, Second Edition, Unabridged, 1948, page 2509.

The argument and footnotes on *pages 34-37* still further illustrate our opening criticism on page 1 of this brief, and by the same token confirm the inherent weakness of the Government’s case. For it is the “definitely settled” law of this Court—

"That by the law of nations **the inhabitants**, citizens, or subjects **of a conquered** or ceded country, **territory**, or province, **retain all the rights of property which have not been taken from them by the orders of the conqueror**, or the laws of the sovereign who acquires it by cession, **and remain under their former laws until they shall be changed.**" (*Mitchell v. United States*, 9 Pet. 711, 734, inadvertently cited to page 731 at page 32 of our principal brief.)

The oblique reference on *page 34* to how other nations went about seizing natives' land elsewhere avails the Government nothing, for it was Russia's express policy not to take land from the Tlingit anywhere in Alaska. The quotation about Russia taking what it wanted which is so played up in the footnote on *page 35* is a wholly gratuitous and unsupported observation in the *opinion* of the Court of Claims. (This Court has held that it is not at liberty to treat statements in an opinion of that Court as additional findings, *United States v. Wells*, 283 U.S. 102, 120, but even more serious is the extent to which the Court of Claims expressly attributed (R. 19) the decision here under review to that particular erroneous assumption.) Not only do that Court's own findings of fact which are discussed and quoted at page 8 of this brief, *infra*, go far toward rebutting any such assumption, but it is in direct conflict with a widely recognized and authoritative text—Bancroft's History of Alaska (1896 ed.): First, as to Sitka—

"At the same time he [Baranoff] asked for the grant of a small piece of ground for the erection of buildings and for which he offered to pay in beads and other trading goods. The barter was concluded \* \* \*" (Page 388)

And then as to twelve other fortified stations—

"If natives already occupied the most convenient sites, Baranoff was permitted to form settlements at the same points, provided he obtained their consent by

purchase or by making presents". (Page 414, footnote 9).

Nor has there been any "misconception" on our part as to the extent of possession that would have been necessary to perfect an inchoate title—even if for sake of argument it could be assumed that the doctrine of discovery obtained in Alaska and that we were interested in the matter of sovereign rights. Not a single one of the authorities cited at *pages 35-36* would support the broad impression sought to be conveyed on that point. All three authorities approach the matter primarily from the international law standpoint, as Twiss puts it, of a nation's "obligation toward other Nations \* \* \* if it seeks to found an exclusive title to its possession upon the Right of Discovery", (page 162). The pages cited from his work are summed up (page 170) in the paragraph already quoted in full at page 26 of our principal brief. The pages cited from Hall and Lawrence are even more specific—but against rather than for the Government's statement of the alleged principle. Those from Hall are from a chapter similarly devoted to and entitled "Territorial Property of a State," which phrase is defined in the opening sentence as "the property occupied by the state community and subjected to its sovereignty." By contrast, the pages cited by the Government include (page 104) without change the identical excerpt from Hall's 5th Edition already quoted at pages 24-25 of our principal brief.

Both Hall and Lawrence agree on the difficulty of laying down any hard and fast yardstick, but both also agree in negating the very implications for which the Government cites them.

For example, Lawrence, after reiterating at page 151 that the mere fact of settlement, like the mere fact of annexation, will not give even sovereign rights while it stands alone, sums up at page 153 to the effect that—

"Occupation of a considerable extent of coast gives a title up to the watershed of the rivers that enter the

sea along the occupied line; but settlement at the mouth of a river does not give a title to all the territory drained by the river."

and Hall similarly questions whether even the

"occupation of one bank of a river necessarily confers a right to the opposite bank." (Page 108.)

Enough has been cited to demonstrate two points. One is that the Government's citations fall short of supporting its allegations. And the other is that even at best all three authorities are concerned primarily with the establishment of sovereign rights, and *a fortiori* discovery and sparse occupation would lend even less support to the development of an adverse proprietary ownership. Especially so in Alaska where none of the title to the soil was taken from the Indians and granted to others as was the common practice stateside. Cf. *Johnson v. McIntosh*, 8 Wheat. 543, 579-581, 587-589.

The setting up of straw men by the Government in the paragraphs beginning on *pages 37 and 38* are further *indicia* of its inability to meet our case squarely and head on. Our only reference to Russia not being a Roman Catholic or maritime power was by way of explanation and not of argument such as is now sought to be attributed to us. But we did go right on in the very next paragraph on *pages 24-25* of our brief to point out on the same eminent authority now cited by the Government that by the time Russia finally reached Alaska "the bare fact of discovery" had become "an insufficient ground of proprietary right," and indeed the Government's discussion on its *page 39* tends to confirm rather than rebut our position.

As to the paragraph beginning on *page 38*, it is sufficient to note that we never advanced petitioner's relatively higher culture as having in any way *prevented* Russia's acquisition of title by discovery. But even if there were something here which called for reply the quotation from Lawrence merely establishes that such a territory would be

"open to occupation." That still gets the Government nowhere, for the record already shows petitioner's initial ownership of most of the Prince of Wales Island area here in question (Respondent-defendant's Exhibit 6, Chart 11) and the findings of fact show no adverse occupation or administration.

But even more interesting is the way the Government's quotation from Lawrence's page 148 leads us right on to two especially pertinent paragraphs on the same and the two immediately following pages—

"Occupation is not effected by discovery \* \* \* effective international occupation is made up of two inseparable elements—*annexation* and *settlement*. \* \* \*

"Annexation alone is incapable of giving a good title. It is necessary for effective occupation that some hold be taken on the country and maintained. This is done by settlement; that is to say **the actual establishment of a civilized administration** and civilized inhabitants upon the territory and their continuous presence therein." (Italics as in the original.)

Indeed those paragraphs are so pertinent when applied to the findings of fact which are part of the record before this Court as to warrant the reprinting of paragraphs 11-15 of those findings (R. 28-29) at this point—

"11. **The Russian American Company**, originally chartered in 1799 and rechartered in 1821 and 1844, was in form a commercial fur and trading monopoly, but in practice it also **functioned as the only governmental agency ever set up in Alaska by the Russians.**

"12. **The Aleutian Islands and the Alaska Peninsula were the only areas ever brought fully under Russian administration**, and the natives of those areas were required to work for the Russian American Company. The other Indian tribes, **and the Tlingit in particular, were generally considered as independent.** During the Company's first twenty years there was considerable hostility between Tlingit and Russians.

"13. In the Charter of 1821, the distinction was drawn between 'tribes inhabiting the places administered by the Company' and 'the independent neighboring people.' Secs. 45-56 dealt at length with the former, Secs. 57-59, 68, dealing with the latter, provided in part as follows:

"Sec. 57. The principal object of the Company being catching of the sea animals and wild beasts, **the Company has no need to spread its rule** from the coast where it practices such catchings, into the interior of the country, **and it should not make effort to conquer tribes inhabiting these coasts**; therefore, if the Company should think it in its interest to establish posts in some localities of the American continent in order to secure its commerce, it shall do so with consent of the aboriginal inhabitants of such localities and shall use all possible means in order to maintain a good relationship with them, avoiding anything which might create in these people suspicion of the intention to violate their independence.

"Sec. 58. The Company is prohibited to ask from such tribes, tributes, taxes, dues or any other kind of contributions; \* \* \*

"14. In the Charter of 1844, **substantially similar distinction were drawn** and Secs. 281-285 provided as follows:

**"Sec. 281. The colonial government shall not forcibly extend the possessions of the Company in regions inhabited by tribes not dependent on the colonial authorities.**

"Sec. 282. If the colonial government deem it useful to open, for the safety of its trade operations, factories, redoubts, or so-called single posts in some places of the American continent, it shall proceed by the consent of the natives of these places, and apply all possible means to obtain their favor, trying to avoid anything which might arouse their suspicion of any intention to violate their independence.

"Sec. 283. The company shall be prohibited from



demanding from these people tributes, taxes, or donations of any kind whatever \* \* \*

\* \* \* \* \*

“Sec. 285. The relations of the colonial administration with the independent tribes shall be limited to the exchange, by mutual consent, of European wares for furs and native products.

“15. Tradition has it that Russian traders visited the Stikine winter village at Wrangell more or less regularly over a period of years prior to 1867; that on their first advent they asked for and received permission to go ashore and build a storehouse; and that on their final visit they gave the key to an Indian saying that it indicated that the property now was returned to the Indians.”

The record thus makes crystal clear that there was never any generally “effective occupation” of the Tlingit area by the Russians or acquisition of any general rights of property from the Tlingit.

#### PETITIONER' POINT II

The Government's Point IV (*page 72*) is its only other point which would appear to be an attempt to directly meet one of our points, viz: our Point II. But again the seeming promise of its heading is unfulfilled. At pages 31-32 of our principal brief we not only cited but also quoted at length from four decisions of this Court which are directly in point and controlling.

The Government's typical avoidance of any serious discussion of these cases is most significant. Nor can it give them the brush off by its suggestion that the language of the treaties involved was distinguishable (*page 75*). Those cases go far deeper than mere language. They go right down to bedrock—to the fundamentals of a treaty of cession. Not one of the four rested on the particular language of the treaty involved. And in only one instance was the language referred to even as corroboration of the universal principle already independently announced. In the *Perche-man* case, 7 Pet. 82, 87-88, we find the following—

“The cession of a territory by name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them would be necessarily understood to pass the sovereignty only, and not to interfere with private property. If this could be doubted, the doubt would be removed by the particular enumeration which follows: ‘The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks, and other public buildings which are not private property, archives and documents which relate directly to the property and sovereignty of the said provinces, are included in this article.’ ”

The tremendous impact which at *pp. 75 ff.* the Government seeks to impute to the probably fortuitous addition in a later treaty of the single word “individual” gets pretty well lost in the shuffle when we read what this Court went on to say about such an entire provision in the paragraph immediately following the above quotation—

“This special enumeration could not have been made, had the first clause of the article been supposed to pass not only the objects thus enumerated, but private property also. The grant of buildings could not have been limited by the words ‘which are not private property’ had private property been included in the cession of the territory.”

In contrast with publicly owned property clan property was certainly private property whether it was individual property or not. And in any event the present case involves timber lands and not buildings or edifices of any sort.

The *Miller* decision of the Ninth Circuit is open to substantially the same criticism, but even more indefensible is the temerity of the Government in repeatedly citing that case to this Court as it does over and over again at *pages 11, 12, 72, 73 and 76*. For it is only two years since this same United States which is respondent in the instant case devoted two long subpoints in its brief in *United States v.*

*Libby, McNeil & Libby*, 107 F. Supp. 697 (1952), to the thesis that the *Miller* case is incorrect, and still another point to the most vigorous support of the contrary position which had consistently been held by the Department which has the primary responsibility for administration of both Indian affairs and Government lands. See our principal brief, pp. 36-41.

And whatever may be the persuasive value of the administrative decisions of that Department as recounted on those pages, it would seem that under the circumstances just described the present references on *page 78* of the Government's brief to "vacillations" and lack of "unanimity" come with dubious grace from the Department of Justice. For any vacillation is wholly of that Department's own making and apparently for admitted reasons of expediency in winning cases as much or even more than because of any interest in establishment of correct principles of law.\*

Before leaving *page 78* let us correct two definitely false impressions which its text might readily succeed in conveying. The first correction is that the *Grimes Packing Company* case was wholly one of statutory construction and application to current conditions, and did not present any issue as to pre-existing Indian title. (For that matter even if the latter issue had been involved, the controlling considerations could have been very different as that case related to a non-Tlingit area tributary to the Alaska Peninsula where Russian administration had been established.

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\*If this Court has any interest in delving further into this departmental background it will find that the present much vaunted agreement between the Departments seems to be based on a January 11, 1954, letter of the Assistant Secretary of the Interior (printed in the Committee Print No. 12 cited at page 10 of the Memorandum for the United States on the Petition for Certiorari) which in turn was obviously forced by a letter of October 22, 1953, from the Attorney General to the Secretary of the Interior (printed at pages 14-18 of that Memorandum). Also that the reference to the *Miller* case at pages 15-16 of the Memorandum stresses the reliance which has been placed upon it in the defense of other cases rather than its inherent correctness.

See pages 8-10 of this brief, *supra*.) The other is that the *Libby, McNeil & Libby* decision was predicated, not on any holding of law that the Indians could not have had rights such as claimed, but rather on insufficiency of evidence in the particular case, as well as on failure to comply with technical requirements of the Administrative Procedure Act.

### PETITIONER'S POINT III

Like the opinion below, respondent's brief in the same ostrich-like way simply avoids any serious consideration of that Point despite the fact that Congress saw fit to recognize its serious possibilities as recently as in the Act of August 8, 1947 (Pet. Br., page 2). Indeed the only and very casual reference to it (*footnote 24 at page 72*), buried as it is in connection with discussion of an entirely different aspect of the case, is no answer whatever. For alleged non-recognition of rights which are claimed to have already existed obviously can furnish no answer to petitioner's claim of the creation of a *new* right in 1884 or 1900. Furthermore, it is familiar law that effect shall be given to every clause and part of a statute. *Ginsberg v. Popkin*, 285 U.S. 204, 208.

There is only one possible inference. Respondent has no answer to this Point.

### PETITIONER'S POINTS IV and V

Frankly we cannot conceal our own feeling that respondent's effort to avoid meeting either of these two issues (*pages 79-80*) is open to much the same inference. But be that as it may, the reasoning advanced on those pages in support of the suggestion for putting off decision is puerile—and we are quite sure that respondent knows it to be so. For such a question as whether the evidence summarized in issue 5 (as recited in the formal court order at R. 7) constitutes *prima facie* evidence of the effect there noted presents a completely stated issue of law not dependent upon further evidence or proceedings of any sort. That order

recognized this issue for what it really is—an integral and major factor in the big overall question as to the nature and extent of Indian land titles in southeastern Alaska. That question was the outstanding reason for review advanced in our Petition for Certiorari (pages 5-6), and presumably a major consideration in its having been granted. From the very nature of things such less intensive user since the turn of the century is not confined to the Tee-hit-ton area alone, and the early decision of this issue is just as essential in the general interest as that of the first four issues.

Even at best there lies before us a long and tedious row to hoe before a final decision of this case can be reached. Our Points IV and V were fully presented below and in our Petition for Certiorari, their decision is essential within both the letter and the spirit of the order under which this case was tried in the Court of Claims, and we urge that they should be considered by this Court. *Ecker v. Western Pacific Railroad Corp.*, 318 U.S. 448, 489; *Girard Trust Company v. United States*, 270 U.S. 163, 168-169. Especially so as the allowance of review was not subject to any such limitation.

#### PETITIONER'S POINT VI

The Government's Points II and III at *pages 40-72* advance a line of argument which was not even suggested in its brief below and which has acquired transitory importance only because of having been injected into the case by the Court of Claims on its own initiative as a principal ground of its decision (R. 32). These issues will never be reached if either of our Points I or III is sustained.\* But

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\* The alleged distinction between recognized and unrecognized title was not raised either in respondent's answer below (R. 36) or in the order limiting the issues to be tried in the present proceeding (R. 7-8). If, however, it becomes important factually, it should be remembered that there were a number of treaties between the Russians and various Tlingit groups, one or more of which might be very relevant.

if perchance these issues should be reached, we find nothing in the Government's brief which calls for answer further than what will already be found in our Point VI at pages 52-62 of our principal brief. See also the *amicus curiae* briefs of the States of Utah and New Mexico.

#### CONCLUSION

Unless this Court is prepared to discard a long line of its own precedents and develop from scratch some new justification for affirming the judgment below, it is submitted that that judgment should be reversed because the case made in our principal brief is controlling and neither the opinion below nor the Government's brief advance any convincing reason for holding otherwise.

Respectfully submitted,

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November, 1954.



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MAY 20 1954

HAROLD B. WILLEY, Clerk

No. [REDACTED] 43

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1953**

**THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE  
GROUP OF ALASKA INDIANS, PETITIONER**

**v.**

**THE UNITED STATES**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF CLAIMS**

**MEMORANDUM FOR THE UNITED STATES**

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# In the Supreme Court of the United States

OCTOBER TERM, 1953

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No. 696

THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE  
GROUP OF ALASKA INDIANS, PETITIONER

v.

THE UNITED STATES

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF CLAIMS*

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## MEMORANDUM FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the Court of Claims (R. 16-32) is not yet reported.

### JURISDICTION

The judgment of the Court of Claims was entered on April 13, 1954 (R. 33). The petition for a writ of certiorari was filed on April 19, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

### QUESTIONS PRESENTED

1. Whether the taking of the unrecognized Indian right of occupancy or "original Indian

title" is compensable without specific legislative direction to make payment.

2. Whether Congress has recognized any legal rights in petitioner to the Alaskan lands here involved.

#### TREATY AND STATUTES INVOLVED

Pertinent portions of the Treaty of June 20, 1867, 15 Stat. 539, and the Joint Resolution of August 8, 1947, 61 Stat. 920, are set out in the Appendix, *infra*, pp. 12-14. Pertinent portions of other statutes are set out in the Discussion, *infra*.

#### STATEMENT

On August 29, 1951, acting pursuant to the Joint Resolution of August 8, 1947, 61 Stat. 920, the Secretary of Agriculture entered into a contract for the sale to Ketchikan Pulp & Paper Company of all merchantable timber available to June 30, 2004, in a specified area of the Tongass National Forest in southeastern Alaska (R. 31-32). Thereupon, this proceeding was instituted by petitioner on the theory that it from "time immemorial continually used, occupied and claimed" the entire area covered by the contract, that its rights to the land had been confirmed and recognized by Congress, and that the execution of the contract constituted a taking *pro tanto* of its rights in the area (R. 1-3).<sup>1</sup> The Gov-

<sup>1</sup> The jurisdiction of the Court of Claims rests upon 28 U. S. C. 1505 (originally section 24 of the Indian Claims

ernment's answer (R. 3-6) *inter alia* denied that petitioner had any collective or group rights in the area and asserted that its possession of the area, if it existed, was not of such a nature as to give rise to a cause of action against the United States for a taking under the Constitution.

Upon petitioner's motion and pursuant to its Rule 38 (b), the court below directed a separate trial as to six issues of law and any related issues of fact (R. 6-8), "the solution of which might make unnecessary the taking of voluminous evidence as to use, occupation, possession and value of large and remote areas in Alaska" (R. 17).<sup>2</sup> At the present time, only the following three issues (R. 7) are of any materiality:<sup>3</sup>

Commission Act of August 13, 1946, 60 Stat. 1049, 1055), as follows:

"The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

Thus, the jurisdiction conferred had reference to tribal claims only, and not to claims of individual Indians.

<sup>2</sup> The area claimed by petitioner comprised 352,800 acres of land and 150 square miles of water (R. 1, 27-28). There are approximately 60 members in the petitioning group (R. 2, 30).

<sup>3</sup> In disposing of the first issue the Court of Claims held that petitioner was an "identifiable group" of Indians within

2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, and permittees used or occupied in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?

3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat. 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it?

4. What such rights, if any, would have inured to it under the Act of June 6, 1900, 31 Stat. 321, 330, in the area, if any, which on that date was so used or occupied by it?

Issue 2 was designed to test the Government's contention that whatever interest petitioner may have had in the lands during the Russian sovereignty had been extinguished by the 1867 treaty whereby Alaska was ceded to the United States. Being doubtful as to the effect of the treaty upon "original Indian title", the Court of Claims

the meaning of 28 U. S. C. 1505 (R. 17-18, 32), and this holding is not being challenged here (see Pet. 2). The fifth and sixth issues, involving the questions whether, assuming the establishment of property rights, such rights had been abandoned, or, if not, had been taken by the execution of the contract, were not answered by the Court of Claims in view of its disposition of the issues quoted in the text (R. 25-26, 32).

did not answer the question as posed (R. 19, 20–23, 32). Instead, it held that, even assuming a tribal property interest of petitioner survived the treaty, it was substantially identical in nature with “original Indian title” or “Indian right of occupancy,” as those terms are understood in relation to the interests of Indian tribes residing within the 48 States (R. 18–19). And in reliance upon this Court’s statement in *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106, and decision in *United States v. Alcea Band of Tillamooks*, 341 U. S. 48, the court held that petitioner would still not have a right in the land, as against the United States, unless Congress had recognized petitioner’s interest as a legal interest (R. 19–20, 32). It was also concluded that legislation relied upon by petitioner did not constitute a recognition by Congress of any legal rights in the petitioning tribe to the lands in controversy, but rather indicated an awareness that there is a legal dispute as to the question of ownership (R. 22–25, 32). Consequently, upon the Government’s motion (R. 32–33), the cause was dismissed (R. 33).

#### DISCUSSION

1. Reasoning from findings as to the mode of living of petitioner’s ancestors and their relations with the Russian government prior to the cession of 1867 (R. 26–30),<sup>4</sup> the court below concluded

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<sup>4</sup> Petitioner does not challenge these findings.

that the tribal interest prior to 1867 in the Alaskan lands at issue was substantially identical in nature with that of Indian tribes residing in the 48 States, *i. e.*, what is called "original Indian title" or "Indian right of occupancy" (R. 18-19, 32). It is now clear that, even if such "original Indian title" survived the cessation of Alaska, it is not such an interest in land as would be compensable under the Constitution unless it had been "recognized" in some manner by Congress.

Prior to its decision in *United States v. Tillamooks*, 329 U. S. 40, 42, 44, this Court had never passed upon the question of the compensability of "unrecognized" original Indian title. The opinion of Chief Justice Vinson in that case was interpreted as a holding that "original Indian title" was compensable. *Miller v. United States*, 159 F. 2d 997, 1001, 1005 (C. A. 9). However, in a footnote to its opinion in *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106, this Court disagreed, in part,<sup>5</sup> with that opinion and stated that the opinion in the *Tillamooks* case did not hold "the Indian right of occupancy compensable without specific legislative direction to make payment." And in a still later opinion, *United*

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<sup>5</sup> It is to be noted, however, that this disagreement did not extend to the other holdings in the *Miller* case that original Indian title had been extinguished in Alaska by the 1867 treaty (159 F. 2d at pp. 1001-1002) and that the only Indian possessory rights to lands in Alaska protected or recognized by Congress were individual rather than tribal (159 F. 2d at p. 1005). Cf. Pet. 6.



*States v. Alcea Band of Tillamooks*, 341 U. S. 48, this Court held that the recovery by the Tillamooks was not grounded upon a taking under the Fifth Amendment.<sup>6</sup> We submit, therefore, that, there being no statutory direction to make payment in this case, and there being, as we shall show below, no "recognition" of the alleged original Indian title, the Court of Claims correctly held the law to be that the "original Indian title" to the lands involved is not compensable.

2. Petitioner contended that its tribal right of occupancy had been "recognized" by Congress by section 8 of the Act of May 17, 1884, 23 Stat. 24, 26, by section 14 of the Act of March 3, 1891, 26 Stat. 1095, 1100, and by section 27 of the Act of June 6, 1900, 31 Stat. 321, 330, 48 U. S. C. 356 (R. 2).<sup>7</sup> It was and is the Government's contention that all tribal interests in the lands had been extinguished by the 1867

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<sup>6</sup> The Government's brief in the second *Alcea* case (No. 281, October Term, 1950) sets out at length the reasons for the view that an alleged taking of "original Indian title" cannot be the basis for compensation, absent specific legislative direction.

<sup>7</sup> Section 8 of the Act of May 17, 1884, provides:

"\* \* \* That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress \* \* \*."

Section 14 of the Act of March 3, 1891, provides:

"That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the

treaty between this country and Russia, and that the subsequent statutes had reference only to the property interests of individuals, Indians and others, in lands actually occupied by them (R. 3-4, 20). This was the holding in *Miller v. United States*, 159 F. 2d 997, 1001-1005 (C. A. 9); see also *United States v. 10.95 Acres of Land in Juneau*, 75 F. Supp. 841, 843-844 (D. Alaska); *United States v. Libby, McNeil & Libby*, 107 F. Supp. 697 (D. Alaska). The holding of the *Miller* case, which we submit is correct, would obviate the necessity of any determination as to the compensability of "original Indian title", or as to whether or not Congress had "recognized" or confirmed such an interest in the petitioner. However, the court below, as has already been noted, expressed doubt as to the effect of the 1867 treaty in extinguishing Indian title (R. 20-22), and based its dismissal of the cause on the ground that the statutes relied upon did not

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sale of any lands belonging to the United States \* \* \* to which the natives of Alaska have prior rights by virtue of actual occupation. \* \* \*

Section 27 of the Act of June 6, 1900, provides:

"The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, and the land, at any station not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in the section, with the improvement thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong. \* \* \*

constitute a "recognition" of any legal rights in the tribe (R. 23-25, 32). Granting for the moment that it was necessary to reach this issue of "recognition", we believe that the court's conclusion is correct. Cf. *Shoshone Indians v. United States*, 324 U. S. 335. Rather than indicating any intention to recognize that petitioner had any legal interest in the lands, the statutes were designed merely to preserve the *status quo* with respect to possession, leaving the question of legal rights for future determination. And the Joint Resolution of August 8, 1947, 61 Stat. 920, *infra*, pp. 12-14, demonstrates that the issue, insofar as Congress was concerned, was still an open one.

It is clear, therefore, that whatever may be the rights of individual Indians under the 1884 Act and subsequent legislation in specific areas of land actually occupied by them, the petitioning tribe can have no compensable interest based upon original Indian title, either because such title was extinguished by the 1867 treaty (*Miller v. United States*, 159 F. 2d 997, 1001-1002 (C. A. 9)), or, as the court below held, because it has not been recognized by Congress.

3. For these reasons, we believe that the decision below is plainly correct. However, we must acknowledge the impact of the questions presented. There are now pending before the Indian Claims Commission approximately 400 cases, involving some 800 separate claims or causes of

action by Indians in the continental United States. Of these 800 claims, about half involve in some form or other the question of the compensability of "original Indian title." With specific reference to Alaskan Indians, there is one case pending in the Court of Claims and 12 others in the Indian Claims Commission. Moreover, so long as it is contended that the questions remain unsettled, there may be a cloud upon the title to much of the land in Alaska and its further development may be thereby impeded (see e. g. S. Doc. 159, 80th Cong., 1st Sess.). Both the petitioner (Pet. p. 6) and the Court of Claims (R. 22) have the impression that there is a conflict of views in the executive departments on this matter. In view of the references made by petitioners and the court to the letter of the Attorney General, we print that letter in full in the appendix, *infra*, pp. 14-18. That letter and Committee Print No. 12 of the House Committee on Interior and Insular Affairs, containing recent reports of the Departments of the Interior, Agriculture, and Justice on H. R. 1921, 83rd Cong., a bill to settle possessory land claims in Alaska, make it clear that there is now agreement that no compensable rights flow from unrecognized original Indian title in Alaska or elsewhere.

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\* See appendix to the Government's brief in *United States v. Alcea Band of Tillamooks*, No. 281, October Term, 1950, for a detailed list of such cases pending on January 10, 1951, more than six months before the cut-off date for filing claims with the Indian Claims Commission.

## CONCLUSION

We believe that the cause was correctly dismissed both on the ground taken by the court below and on the alternative ground adopted by the United States Court of Appeals for the Ninth Circuit in *Miller v. United States*, 159 F. 2d 997. However, the Court may be of the opinion that the questions presented are important enough to merit review.

Respectfully submitted.

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MAY 1954.

## APPENDIX

1. Pertinent portions of the Treaty of March 30, 1867, 15 Stat. 539, are as follows:

\* \* \* \* \*

Article II. In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. \* \* \*

Article VI. \* \* \* The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate. Russian or any other, or by any parties, except merely private individual property holders; \* \* \*

2. The Joint Resolution of August 8, 1947, 61 Stat. 920, provides:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That "possessory rights" as used in this resolution shall mean all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes, native villages, native individuals, or other*

persons, and which have not been confirmed by patent or court decision or included within any reservation.

SEC. 2. (a) The Secretary of Agriculture, in contracts for the sale, or in the sale, of national forest timber under the provisions of the Act of June 4, 1897 (30 Stat. 11, 35), as amended, is authorized to include timber growing on any vacant, unappropriated, and unpatented lands within the exterior boundaries of the Tongass National Forest in Alaska, notwithstanding any claim of possessory rights. All such contracts and sales heretofore made are hereby validated.

(b) The Secretary of the Interior is authorized to appraise and sell such vacant, unappropriated, and unpatented lands, notwithstanding any claim of possessory rights, within the exterior boundaries of the Tongass National Forest as, in the opinion of the Secretary of the Interior and the Secretary of Agriculture, are reasonably necessary in connection with or for the processing of timber from lands within such national forest, and upon such terms and conditions as they may impose.

(c) The purchaser shall have and exercise his rights under any patent issued or contract to sell or sale made under this section free and clear of all claims based upon possessory rights.

SEC. 3. (a) All receipts from the sale of timber or from the sale of lands under section 2 of this resolution shall be maintained in a special account in the Treasury until the rights to the land and timber are finally determined.

(b) Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights



to lands or timber within the exterior boundaries of the Tongass National Forest.

3. Letter of October 22, 1953, from the Attorney General to the Secretary of the Interior:

HONORABLE DOUGLAS MCKAY  
Secretary of the Interior  
Washington, D. C.

MY DEAR MR. SECRETARY: This is in response to your letter of October 9, 1953, concerning the adverse decision in the case of United States v. Libby, McNeill and Libby, in the United States District Court for the Territory of Alaska. The essential issue in this case is the validity of an order of the Secretary of the Interior of November 30, 1949, setting aside an area of 100,000 acres in Alaska as the Hydaburg Indian Reservation pursuant to an Act of May 2, 1936, authorizing the establishment of Indian reservations in Alaska under specified circumstances. Since this action seeks an injunction against the maintenance by the defendant of a fish trap at a particular location at Sukkwan Island, an appeal would be successful only by showing that this area could properly be included in a reservation. I have concluded that such a showing cannot be made in this case. Incidentally, but for the reservation, the area is a part of the Tongass National Forest under the Department of Agriculture. And the defendant's fish trap operation has been continuous since 1927 under a War Department license, and, since 1945, under a special use permit of the United States Forest Service.

The Acting Solicitor General has recommended that no appeal be taken, and

after personal consideration I concur in his recommendation for reasons briefly summarized as follows:

The first category of property which may be reserved under the 1936 Act is an area of land which had been reserved for the use and occupancy of Indians by Acts of 1884 or 1891. The 1884 Act provided that Indians or other persons should not be disturbed in the possession of any lands "actually in their use or occupancy", and the 1891 Act refers to lands to which Alaskan natives "have prior rights by virtue of actual occupation." The trial court has found on the evidence that the occupation required by these statutes was not established. The appellate court can, of course, overturn such a finding only if it is clearly erroneous. A thorough examination of the record, however, shows that there is ample support for the findings. For example, the statement in the court's opinion that a census enumerator in 1900 found on Sukkwan Island, which is the size of Manhattan Island, only three persons, a white man, his Tlinget wife and another woman, accurately reflects the nature and substance of the testimony before him.

It has been suggested that rather than actual occupancy, only "aboriginal occupancy"—meaning the roaming of an area for hunting and fishing purposes by aborigines—need be shown. I should like to point out that this is contrary to the language of the statutes which refer to "actual" occupancy, not aboriginal occupancy. In addition, in *Miller v. United States*, 159 F. 2d 997 (C. A. 9, 1947) the Court of Appeals to which this case would go adopted a contention urged by the

United States on behalf of the Department of the Army that any aboriginal title the Indians in Alaska may have had was extinguished by the Treaty with Russia whereby the United States acquired that territory. Considerable reliance has been placed upon the decision in the Miller case in the defense of suits against the United States before the Indian Claims Commission, and I do not believe this consistent position should be reversed. But apart from this, the language of the statutes here involved precludes reliance upon aboriginal occupancy.

The 1936 Act also authorizes the reservation of land "which has been heretofore reserved under any Executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof". It appears that 189 acres were withdrawn from the National Forest in 1927 as a townsite for the Village of Hyda-burg and a patent under the townsite laws was issued in 1933 to an employee of the General Land Office in trust for the individual inhabitants of the village, whether Indian or white. The district court has held that this portion of the 1936 Act contemplated an area set aside by Executive Order as a reservation for Indians as a tribe or group and that neither the 1927 withdrawal nor the townsite patent created such a reservation. It does not appear that this holding is erroneous, and, in any event, the village is located some 12 miles from the area immediately involved in the present case.

The 1936 Act also authorizes the reservation of "additional public lands adjacent thereto". This provision becomes appli-

cable only if a base is provided of lands in the earlier categories, to which the additional public lands are adjacent. Even if the townsite might be considered to furnish such a base, the court's conclusion that the area of 100,000 acres was not "adjacent" to the 189 acre townsite cannot be said to be clearly erroneous. In this connection the fact is important that the area containing the fish trap with which this case is concerned is on the side of an island furthest from the Village of Hydaburg, which is across a strait from the island.

Thus the particular circumstances of this case fail to show a reasonable basis for seeking reversal of the judgment. In my opinion the decision of the district court would be affirmed by the Court of Appeals on grounds which would not be reviewed and reversed by the Supreme Court. It by no means follows that I agree with all that is said in the district court's opinion. Moreover I do not believe that this decision would establish the invalidity of the other reservations in Alaska since each case turns on its own facts.

Finally, it must be borne in mind that the result of the decision is that the area remains property of the United States as part of the Tongass National Forest and is subject to use and disposition under applicable legislation. And, in any event, no permanent sacrifice of rights of the Indians will result from this decision, since, under *Hynes v. Grimes Packing Co.*, 337 U. S. 86 (1949), a reservation of lands under the 1936 Act is merely temporary and is not a grant of vested rights to the Indians.

I trust that this summary makes clear my reasons for concluding that an appeal should not be taken in this case. I sincerely regret that I am unable to give you a more favorable reply.

Sincerely,

(Signed) HERBERT BROWNELL, Jr.,  
*Attorney General.*

No. 43

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# In the Supreme Court of the United States

OCTOBER TERM, 1954

THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE  
GROUP OF ALASKA INDIANS, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF CLAIMS

BRIEF FOR THE UNITED STATES

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1954

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No. 43

THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE  
GROUP OF ALASKA INDIANS, PETITIONER

*v.*

THE UNITED STATES

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF CLAIMS*

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BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 16-26)  
is reported at 120 F. Supp. 202.

JURISDICTION

The judgment of the Court of Claims was entered April 13, 1954 (R. 33). The petition for a writ of certiorari was filed April 19, 1954, and granted June 7, 1954 (R. 35). The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

## TREATY AND STATUTES INVOLVED

The Treaty of March 30, 1867, 15 Stat. 539; Sections 8 and 12 of the Act of May 17, 1884, 23 Stat. 24; Section 27 of the Act of June 6, 1900, 31 Stat. 321, 48 U. S. C. 356; and the Joint Resolution of August 8, 1947, 61 Stat. 920, are set out in the Appendix, *infra*, pp. 81-89.

## QUESTIONS PRESENTED

1. Whether petitioner's alleged property interest in the Alaskan lands involved is anything more than "original Indian title."

2. Whether unrecognized "original Indian title" is a property interest the taking of which is compensable under the Fifth Amendment.

3. Whether petitioner's alleged property interest was ever "recognized" by the sovereign, either Russia or the United States.

4. Whether, in any event, petitioner's alleged property interest was extinguished by the 1867 treaty of cession of Alaska to the United States.

5. Whether certain evidence of recent less intensive use of the areas claimed by petitioner constitutes *prima facie* evidence of termination or loss of whatever rights it may have, and whether execution of the timber sales contract involved here would constitute a taking of petitioner's rights if they were proved.<sup>1</sup>

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<sup>1</sup> We do not believe that the two issues stated in this question are ready for review by this Court. See *infra*, p. 79-80.

## STATEMENT

The Joint Resolution of August 8, 1947, 61 Stat. 920 (*infra*, pp. 88-89) authorized the Secretary of Agriculture to sell timber growing on any vacant, unappropriated, and unpatented lands within the boundaries of the Tongass National Forest in Alaska, notwithstanding any claim of possessory rights. On August 20, 1951, acting pursuant to such authorization the Secretary entered into a contract for the sale to Ketchikan Pulp & Paper Company of all merchantable timber available to June 30, 2004, in a specified area of the Tongass National Forest (R. 31-32). Thereupon, this proceeding was instituted by petitioner on the theory that members of the tribe from "time immemorial continually used, occupied and claimed" the entire area covered by the contract "in their accustomed Indian manner;" that its rights to the land had been confirmed and recognized by Congress; and that the execution of the contract constituted a taking *pro tanto* of its asserted rights in the area (R. 1-3), which were alleged to be the "full proprietary ownership in fee simple" or, alternatively, "the right to unrestricted possession, occupation, and use" (R. 2). The prayer was for damages for the alleged taking, or, in the alternative, for an accounting (R. 3). The Government's answer (R. 3-6), *inter alia*, denied that petitioner had any collective or group rights in the area and



asserted that its possession of the area, if it existed, was not of such nature as to give rise to a cause of action against the United States for a taking under the Constitution (R. 3-4).

Upon petitioner's motion and pursuant to that court's Rule 38 (b), the Court of Claims directed a separate trial as to six issues of law and any related issues of fact (R. 6-8), "the solution of which might make unnecessary the taking of voluminous evidence as to use, occupation, possession and value of large and remote areas in Alaska" (R. 17).<sup>2</sup> At the present time, the following three issues (R. 7) are of major significance:<sup>3</sup>

2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, and permittees used or oc-

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<sup>2</sup> The area claimed by petitioner comprised 352,800 acres of land and 150 square miles of water (R. 1, 27-28). There are approximately 60 members in the petitioning group (R. 2, 30).

<sup>3</sup> In disposing of the first issue the Court of Claims held that petitioner was an "identifiable group" of Indians within the meaning of 28 U. S. C. 1505 (R. 17-18, 32). The fifth and sixth issues, involving the questions whether, assuming the establishment of property rights, such rights had been abandoned, or, if not, had been taken by the execution of the contract, were not answered by the Court of Claims in view of its disposition of the issues quoted above (R. 25-26, 32). Their disposition here is discussed *infra*, pp. 79-80.

occupied in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?

3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat. 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it?

4. What such rights, if any, would have inured to it under the Act of June 6, 1900, 31 Stat. 321, 330, in the area, if any, which on that date was so used or occupied by it?

Issue 2 was designed to test the Government's contention that whatever interest petitioner may have had in the lands during the Russian sovereignty had been extinguished by the 1867 treaty whereby Alaska was ceded to the United States. Being doubtful as to the effect of the treaty upon "original Indian title," the Court of Claims did not answer the question as posed (R. 19, 20-23, 32). Instead, it held that, even assuming a tribal property interest of petitioner survived the treaty, it was substantially identical in nature with "original Indian title" or "Indian right of occupancy," as those terms are understood in relation to the interests of Indian tribes residing within the 48 States (R. 18-19). And in reliance upon this Court's statement in *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106, and decision in *United States v. Tillamooks*, 341 U. S. 48, the court held

that petitioner would still not have a right in the land, as against the United States, unless Congress had recognized petitioner's interest as a legal interest (R. 19-20, 32). It also concluded that the legislation relied upon by petitioner did not constitute a recognition by Congress of any legal rights in the petitioning tribe to the lands in controversy, but rather indicated only an awareness that there was a legal dispute as to the question of ownership (R. 22-25, 32). Consequently, upon the Government's motion (R. 32-33), the cause was dismissed (R. 33).

#### SUMMARY OF ARGUMENT

##### I

Petitioner's alleged property interest in the Alaskan lands involved here is nothing more than "original Indian title."

A. It is a well established principle of international law that with respect to the lands of this continent "discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." *Johnson v. McIntosh*, 8 Wheat. 543, 573. As is well illustrated by the proclamations of the various sovereigns, the enactments of the colonial legislatures, judicial opinions (including opinions of this Court), and other sources, the discovering nations asserted in themselves, by virtue of the

principle of discovery, the complete and exclusive title to the land—subject only to a right of occupancy in the Indians, such right being retained by the Indians only by the grace of the sovereign.

B. This Indian right of occupancy, also known as “original Indian title,” is not a right in the soil itself, but is merely a usufructuary right, i. e., the right of using and enjoying the profits of a thing belonging to another, without impairing the substance. It is comparable to the right of a mere licensee.

C. As other European nations did with respect to their parts of the New World, Russia asserted complete title to Alaska by virtue of discovery. This is shown by various historical facts but particularly by the 1821 ukase of Emperor Alexander, claiming proprietary rights by virtue of first discovery, first occupation, and peaceable and uncontested occupation. Petitioner’s arguments to the contrary are based upon erroneous conceptions as to the history and content of the doctrine of title by discovery, and its application by and to Russia, and are clearly without substance. Thus, with the coming of Russia petitioner’s title to lands in Alaska, whatever it was prior thereto, was reduced to “original Indian title,” and, absent any showing of a grant from the sovereign, petitioner’s interest was no greater than conventional aboriginal title during Russian sovereignty or thereafter.

## II

If unrecognized "original Indian title" is taken, the Fifth Amendment does not require compensation to be paid.

A. The Court having been evenly divided on the question, the decision in *United States v. Tillamooks*, 329 U. S. 40, was not a holding that the taking of "original Indian title" was compensable under the Fifth Amendment. However, the *per curiam* decision of the Court in the later *Tillamooks* case (*United States v. Tillamooks*, 341 U. S. 48) that interest was not payable as part of the award for the taking is a holding that the taking of "original Indian title" is not compensable under the Constitution.

B. Apart from the *Tillamooks* decisions, it is clear that, as against the United States, Indians do not possess the same rights under the unrecognized "original Indian title" as under a recognized title. Although mere unrecognized "Indian title," until extinguished by the sovereign, is protected against the acts of others, the United States can terminate it at will, and its power to terminate is not limited to a right to purchase. By discovery, the European nations claimed exclusive title to the New World subject only to a temporary right of Indian occupancy, and asserted the exclusive right and power to extinguish the "original Indian title" or temporary right of occupancy by purchase, by conquest, or in any

other manner. The United States succeeded to the same title by discovery when it took over sovereignty, and its obligation upon taking Indian lands was understood at the time the Union was formed, and repeatedly characterized since, as being a political, not a legal, obligation. *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339, 347; *Shoshone Indians v. United States*, 324 U. S. 335, 339.

C. That "Indian title" was not a property right for the extinguishment of which the sovereign was constitutionally liable is shown by the fact that, prior to and following the adoption of the Constitution and the Fifth Amendment, seven of the original States ceded lands occupied by Indians to the United States for the purpose of sale to create a fund for the common benefit of all the States. Clearly, it was the understanding of the States and the United States that there was no obligation to pay the value of the lands to the Indians when their occupancy was extinguished. The same view was reflected by the House Committee on Indian Affairs in 1830. H. Rept. No. 227, 21st Cong., 1st sess.

D. There is some language in the cases which, if taken to apply to "original Indian title," would support the view that the United States could not extinguish such title without incurring the obligation to pay just compensation. But when the distinctions between recognized and unrecog-

nized "Indian title" and between the actions of the United States and others are kept in mind, it becomes clear that these cases are not contrary to the Government's position here.

The fact that the United States has elected to extinguish "Indian title" by treaty or agreement with the Indians, i. e., by resort to its right to purchase, does not create a constitutional obligation to compensate for "Indian title" otherwise extinguished. The practice of treating peaceably with the Indians was simply a legislative policy, dictated by expediency and humane motives. It was not a recognition of "Indian title" as a compensable property interest; nor was the practice of extinguishing "Indian title" by treaty or agreement inconsistent with the right of the Government to extinguish "Indian title" by any other means and on any other terms.

### III

Petitioner cannot properly claim compensation on the ground that its "title" has been recognized. The recognition necessary to support constitutional liability for a taking must be such as to amount to a guarantee of a perpetual right of occupancy to the Indians. Petitioner disclaims that Russia so recognized its right of occupancy, and the few statutes relied upon as establishing recognition by the United States show at most only an intention to preserve the *status quo* in



Alaska. They do not, therefore, furnish the necessary recognition.

#### IV

In any event, it has been correctly held that petitioner's Indian title was extinguished by the 1867 treaty of cession of Alaska. *Miller v. United States*, 159 F. 2d 997, 1001-1005 (C. A. 9). Such a holding is required by the plain language of the treaty that there was no obligation on the United States to protect the native tribes in the enjoyment of property and that the cession included title to all lands not "private individual property," free of encumbrances except those of "merely private individual property holders."

Furthermore, petitioner's reliance upon vacillating administrative interpretations as to the quantum of aboriginal rights in Alaska is not persuasive, especially since Congress is supreme in the sphere of the acquisition, control, and disposition of the territories of the United States, and Congress has not acceded to such views.

#### V

Petitioner also discusses the questions of whether there has been an abandonment of its alleged interest and of whether execution of the timber sales agreement involved here constituted a "taking" of petitioner's rights. The Court of Claims did not discuss or pass upon these issues,

and in our view they are not ready for decision by this Court.

#### ARGUMENT

##### I. PETITIONER'S ALLEGED PROPERTY INTEREST IN THE ALASKAN LANDS INVOLVED IS NOTHING MORE THAN "ORIGINAL INDIAN TITLE"

Petitioner, a "clan" of Tlingit Indians of southeastern Alaska, claims the right of full proprietary ownership in fee simple in the area in question by virtue of the fact that its members have as a tribe, band, clan, or group from time immemorial continually used, occupied, and claimed the area in their accustomed Indian manner (R. 2). The gist of its argument in support of this claim is that its interest in the area was substantially different from the Indian title encountered within the area of the 48 States (Pet. Br. 7, 14-28). The court below agreed that petitioner's ancestors had "a species of ownership in the lands which they used for hunting, fishing, and berry picking" (R. 18), but held that such "interest was what is called, in relation to American Indians, 'original Indian title' or 'Indian right of occupancy,' with its weaknesses and imperfections" (R. 19). In this Point, we shall show that, at the time of the cession of Alaska to the United States in 1867, petitioner could have had no greater interest in the area at issue.

A. *The discovering nations acquired absolute title to the lands of this continent subject only to the Indian right of occupancy.*—Prior to the great era of discovery beginning in the latter part of the fifteenth century, the Christian nations of Europe acquired jurisdiction over newly discovered lands by virtue of grants from the Popes, who claimed the power to grant to Christian monarchs the right to acquire territory in the possession of heathens and infidels. Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), pp. 124–125. For example, in 1344, Clement VI had granted the Canary Islands to Louis of Spain upon his promise to lead the islanders to the worship of Christ, and, following the discovery of the New World by Columbus, Alexander VI in 1493 and 1494 issued bulls granting to Spain all lands not under Christian rule west of a line 100 leagues west of the Azores and Cape Verde Islands. *Ibid.*, p. 125; *Cambridge Modern History* (1934), Vol. 1, p. 23. The latter papal grant, because of the breaking down of the papal authority and the vastness of the territory covered, was not accepted by the other nations or even greatly relied upon by Spain, and it was necessary for the civilized, Christian nations of Europe to develop a new principle which all could acknowledge as the law by which they should regulate, as between themselves, the right of

acquisition of territory in the New World, which they had found to be inhabited by Indians who were heathens and uncivilized according to European standards. Lawrence, *Principles of International Law* (7th ed., 1923), pp. 146-147; Lindley, *ibid.*, pp. 126-129.

At first, mere discovery was considered sufficient to create a good and complete title, but because of the extravagant, conflicting claims based upon discovery alone it was soon found that a more stringent basis was necessary. Lawrence, *Principles of International Law* (7th ed., 1923), pp. 146-147. After a lapse of many years the principle was finally evolved "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." *Johnson v. McIntosh*, 8 Wheat. 543, 573; *Martin v. Waddell*, 16 Pet. 367, 409-410; Lawrence, *Principles of International Law* (7th ed., 1923), pp. 148-149; Moore, *International Law Digest* (1906), Vol. 1, pp. 258-259; Story, *Commentaries on the Constitution of the United States* (5th ed., 1891), pp. 106-107.

Although the nations of Europe thus ceased to recognize the Popes as the source of their titles to newly acquired lands, the new concept of title by discovery was based upon the same idea that lands occupied by heathens and infidels were open

to acquisition by the Christian nations.<sup>4</sup> As stated in *Johnson v. McIntosh*, 8 Wheat. 543, 573:

\* \* \* The potentates of the old world found no difficulty in convincing themselves, that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. \* \* \*

The Indians retained certain rights of occupancy, but the discoverers asserted exclusive title in themselves, subject only to the right of occupancy. *Johnson v. McIntosh*, 8 Wheat. 543, 574.

That the discovering nations asserted complete title in themselves, even as against the heathen natives, is well illustrated by the enactments of the colonial legislatures. In Massachusetts, as early as the period 1633-1637, the General Court had declared (Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (1832), pp. 9-10):

That what lands any of the Indians in this jurisdiction have possessed and improved, by subduing the same, they have just right unto, according to that in Gen. 1, 28, and Chap. 9, 1, and Psal. 115, 16.<sup>5</sup>

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<sup>4</sup>This is demonstrated by the fact that the English sovereign's grant of a commission to the Cabots was for the discovery of countries then unknown to Christian people and to take possession in the name of the English king. Similar commissions issued to Gilbert and Raleigh. See *Johnson v. McIntosh*, 8 Wheat. 543, 576-577.

<sup>5</sup>Gen. 1: 28. "And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and

And for the further encouragement of the hopeful work amongst them, for the civilizing and helping them forward to Christianity, if any of the Indians shall be brought to civility, and shall come among the English to inhabit, in any of their plantations, and shall there live civilly and orderly, that such Indians shall have allotments amongst the English, according to the custom of the English in like case.

\* \* \* \* \*

*And further it is ordered by this Court*  
 \* \* \* That all the tract of land within this jurisdiction, whether already granted to any English plantations or persons, or to be granted by this Court (not being under the qualifications of *right* to the Indians) is, and shall be accounted the just *right* of such English as already have, or hereafter shall have grant of lands from this Court, and the authority thereof, from that of Gen. 1. 28, and the invitation of the Indians.<sup>6</sup>

In Maryland, in 1704, the Assembly, feeling that it was "most just that the Indians, the ancient inhabitants of this province, should have a convenient dwelling place in this their native

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subdue it: \* \* \*." Chap. 9: 1. "And God blessed Noah and his sons, and said unto them, Be fruitful, and multiply, and replenish the earth." Psal. 115: 16. "The heaven, even the heavens, are the Lord's; but the earth hath he given to the children of men."

\* Italics in original. Unless so noted, emphasis has been supplied throughout this brief.

country," granted to the Nanticoke Indians a tract of land, so long as they should occupy and live upon the same, "to be held of the lord proprietary, and his heirs, \* \* \* under the yearly rent of one beaver skin, to be paid to his said lordship, and his heirs, as other rents in this province by the English used to be paid." Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (1832), pp. 140-141. And, in 1748, North Carolina granted to the Tuscarora Indians a described tract, "it being but just that the ancient inhabitants of this Province shall have and enjoy a quiet and convenient dwelling place in this their native country." Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (1832), p. 163.

The General Assembly of Virginia, in 1658, having received many complaints from the Indians of intrusion on lands occupied by the Indians, stated (Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (1832), p. 149):

\* \* \* which this Assemblie conceiving to be contrary to justice, and the true intent of the English plantation in this country, whereby the Indians might, by all just and fair waies, be reduced to civillity, and the true worship of God, *have therefore thought fitt to ordaine and enact, and bee it hereby ordained and enacted*, That all the Indians of this collonie shall and may



hold and keep those seates of land which they now have \* \* \*.

Seldom was it considered necessary for the principle of ownership by the Crown or the proprietors to be set forth in so many words. But in the laws of Connecticut, as early as 1717, we find it declared by the Assembly (Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (1832), p. 41) :

That all lands in this Government are holden of the King of Great Britain, as the lord of the fee, and that no title to any lands in this Colony, can accrue by any purchase made of Indians, on pretence of their being native proprietors thereof, without the allowance and approbation of this Assembly.

And South Carolina, in 1739, prohibited the practice of purchasing lands from the Indians because "such practices tend to the manifest prejudice of his majesty's just right *and title to the soil* of this province." Laws of the Colonial and State Governments Relating to Indians and Indian Affairs (1832), p. 178.

The principle that all lands belonged to the sovereign is further shown by the proclamation of George III of October 7, 1763, whereby he gave to the governors authority to grant lands

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\* Italics in original.

within their colonies, but stated (American State Papers, Public Lands, Vol. 1, pp. 30, 31):

And whereas it is just and reasonable, and essential to our interest, and the security of our colonies, that the several nations or tribes of Indians, with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to or purchased by us, are reserved to them, or any of them, as their hunting grounds; we do, therefore, with the advice of our privy council, declare it to be our royal will and pleasure, that no governor or commander-in-chief in any of our colonies of Quebec, East Florida, or West Florida, do presume, upon any pretence whatever, to grant warrants of survey, or pass any patents for lands beyond the bounds of their respective governments, as described in their commissions; as also that no governor or commander-in-chief of other colonies or plantations in America, do presume for the present, and until our further pleasure be known, to grant warrant of survey, or pass patents for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic ocean from the west or northwest; or upon any

lands whatever, which, not having been ceded to, or purchased by us, as aforesaid, are reserved to the said Indians, or any of them.

*And we do further declare it to be our royal will and pleasure for the present, as aforesaid, to reserve under our sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company; as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west, as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.*

It is clear that the King was here exercising complete dominion over the whole area even to the extent of asserting that he was reserving "under our sovereignty, protection and dominion, for the use of said Indians, all the lands not included within the limits of our said three new governments."

This whole concept was set forth by Vattel when he said (*Vattel, Le Droit Des Gens* (Fen-

wick translation of 1758 edition, Carnegie Institution (1916), pp. 85-86)) :

There is another celebrated question which has arisen principally in connection with the discovery of the New World. It is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers can not populate the whole country. We have already pointed out (§ 81), in speaking of the obligation of cultivating the earth, that these tribes can not take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.\*

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\* Vattel goes on to say :

"We have already said that the earth belongs to all mankind as a means of sustaining life. But if each Nation had desired from the beginning to appropriate to itself an extent of territory great enough for it to live merely by hunting, fishing, and gathering wild fruits, the earth would not suffice for a tenth part of the people who now inhabit it. Hence we are not departing from the intentions of nature when we restrict the savages within narrower bounds. However, we can not but admire the moderation of the English Puritans who were the first to settle in New England. Although they bore with them a charter from their sovereign, they bought from

And although Chief Justice Marshall found it difficult (*Worcester v. Georgia*, 6 Pet. 515, 543)

to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied;

nevertheless it was precisely on this basis that he was to predicate his now universally accepted doctrine in *Johnson v. McIntosh*, 8 Wheat. 543, 587-589, that:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise. The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly

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the savages the lands they wished to occupy. Their praiseworthy example was followed by William Penn and the colony of Quakers that he conducted into Pennsylvania."

over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.<sup>9</sup>

Thus, it is abundantly clear that the sovereign's ownership of the lands on this continent came, not

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<sup>9</sup> The Chief Justice also said :

"We will not enter into the controversy, whether agriculturists, merchants and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the titles which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it."

from any grants by the native Indians, but rather from the principle of discovery. And it is likewise plain that the Indians retained only a right of occupancy through the grace of the sovereign. *Johnson v. McIntosh*, 8 Wheat. 543, 573-574, 587-588; *Martin v. Waddell*, 16 Pet. 367, 409-410; *United States v. Tillamooks*, 329 U. S. 40, 46.

That this was also the view of the legislative branch of the Government is shown by the exhaustive report of the House Committee on Indian Affairs in 1830 on a bill authorizing the President to remove Indians from treaty reservations to lands west of the Mississippi River.<sup>10</sup> H. Rept. No. 227, 21st Cong., 1st sess. Especially pertinent portions of this report are as follows:

[p. 3] Principles of natural law, and abstract justice, are appealed to by some, to show that the Indian tribes within the territorial limits of the States, ought still to be regarded as the owners of the absolute property in the soil they occupy, and that they are to be regarded as independent communities, having all the attributes of sovereignty, except such as they have voluntarily surrendered. \* \* \*

The foundations of the States which constitute this Confederacy were laid by the Christian and civilized nations, who were instructed or misled, as to the nature of their duties, by the precepts and examples

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<sup>10</sup> This bill became the Act of May 28, 1830, 4 Stat. 411.



contained in the volume which they acknowledged as the basis of their religious rites and [p. 4] creed. To go forth, to subdue and replenish the earth, were received as divine commands, or relied on as plausible pretexts to cover mercenary enterprises, by the governments which gave the authority, and the adventurers who first discovered and took possession of the new world. Whether they were right or wrong in their construction of the sacred text, or whether their conduct can, in every respect, be reconciled with their professed objects or not, it is certain that possession, actual or constructive, of the entire habitable portion of this continent, was taken by the nations of Europe, divided out, and held originally by the right of discovery as between themselves, and by the rights of discovery and conquest as against the aboriginal inhabitants. In the Spanish provinces, the Indians became the property of the grantee of the district of country which they inhabited; and this oppression was continued for a considerable period. Although the practice of the Crown of England was not marked by an equal disregard of the rights of personal liberty in the Indians, yet their pretensions to be the owners of any portion of the soil were wholly disregarded. \* \* \*

[p. 5] \* \* \* but in all the acts, first of the colonies, and afterwards by the States, the fundamental principle, that the In-

dians had no rights, by virtue of their ancient possession, either of soil or sovereignty, has never been abandoned, either expressly or by implication.

\* \* \* \* \*

The recognition of this principle by the Federal Government may be seen, at this day, in those small reservations which are made to individual Indians, or to the tribe itself, upon the relinquishment of the body of their lands. These reservations are made in deference to the principles of humanity, and because it has been found expedient to the interests of the Government making them. No respectable jurist has ever gravely contended, that the right of the Indians to hold their reserved lands, could be supported in the courts of the country, upon any other ground than the grant or permission of the sovereignty or State in which such lands lie. \* \* \*

[p. 6] \* \* \* But the most decisive evidence of the light in which these reservations have always been viewed, in regard to the question of title, is to be found in the fact, that the Crown or the proprietors of Provinces, before the Revolution, and the States, after that event, succeeding as they did to the sovereignty over all the lands within the limits of their respective charters, have asserted the exclusive right, in themselves, to extinguish the title to lands reserved to the Indians, until the Constitution was adopted. Since that

time, the Federal Government has acted upon the same principle, in regard to lands belonging to the Government. If the principle upon which this right is asserted, and the effect it has had in practice, be examined, it will be found to be a complete recognition of the original rule which the nations of Europe acted upon in the first partition and settlement of the country. \* \* \*

B. *The Indian right of occupancy, also called "original" or "aboriginal" Indian title, is merely a usufructuary right.*—We have shown (*supra*, pp. 12-27) that the sovereigns, the European nations and our own, have consistently claimed the absolute and complete title to the lands on this continent, subject only to the Indian right of occupancy. This right of occupancy based upon aboriginal possession has been called "Indian title" and, to distinguish it from a greater Indian title which has been formally acknowledged, recognized, or confirmed by the sovereign by treaty, agreement or statute, is also known as "original Indian title" or "aboriginal Indian title." *United States v. Tillamooks*, 329 U. S. 40, 46, dissenting opinion, pp. 57-58; *Shoshone Indians v. United States*, 324 U. S. 335, 338-339. This right of occupancy, known as original or aboriginal Indian title, was merely a usufructuary right or privilege.

In the early case of *Fletcher v. Peck*, 6 Cranch 87, 121, part of the argument of the defendant in error is reported as follows: <sup>11</sup>

What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. Vattel, lib. 1, § 81, p. 37, and § 209; lib. 2, § 97; Montesquieu, lib. 18, c. 12; Smith's Wealth of Nations, b. 5, c. 1. It is a right not to be transferred, but extinguished. It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.

In that case, the Court found it unnecessary to define with any degree of precision the nature of the Indian rights, but contented itself with the statement (6 Cranch at pp. 142-143) that “\* \* \* the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to a seisin in fee on the part of the state.”

One of the earliest cases to define the right is that of *Cornett v. Winton's Lessee*, 2 Yerg. (10 Tenn.) 143, where Judge Catron said in 1826 (p. 144):

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<sup>11</sup> John Quincy Adams and Joseph Story argued the case for defendant in error.

And what is this Indian title? It has been called by the courts of this State, a *usufructuary right*, nor will I call it by a different name, \* \* \*.

And in *Blair v. The Pathkiller's Lessee*, 2 Yerg. (10 Tenn.) 407, the same judge said (p. 412):

\* \* \* If our construction is right, so soon as the Indian title was extinguished, the sovereignty (Tennessee) to which the incumbered fee belonged, or an individual of that sovereignty to whom it had been granted, took the land disincumbered; because the Indians had no permanent interest in the soil, and nothing passed from them: the right of occupancy was a *usufructuary privilege* subject to extinction. This doctrine applies to all ordinary cases of Indian occupancy.

This description of the right of the Indians cannot be dismissed as merely the unsupported conception of a state court. For in 1850, the same judge, then a Justice of this Court, wrote the unanimous opinion in *Marsh v. Brooks*, 8 How. 223, in which the Court declared that (p. 232):

\* \* \* This Indian title consisted of the *usufruct* and right of occupancy and enjoyment \* \* \*.

And, in 1886, in *The Cherokee Trust Funds*, 117 U. S. 288, 294, speaking of the Cherokees, the Court said:

\* \* \* They claimed the principal part of the country now composing the States of

North and South Carolina, Georgia, Alabama, and Tennessee. Their title was treated by the governments established by England, and the governments succeeding them, as merely *usufructuary*, affording protection against individual encroachment, but always subject to the control and disposition of those governments, at least so far as to prevent, without their consent, its acquisition by others. \* \* \*

In the same year, Mr. Justice Field, in the case of *Buttz v. Northern Pacific Railroad*, 119 U. S. 55, after referring to the decision in *Johnson v. McIntosh*, said (p. 67):

\* \* \* Whilst thus claiming a right to acquire and dispose of the soil, the discoverers recognized a right of occupancy or a *usufructuary right* in the natives. \* \* \*

A "usufructuary right" is ordinarily defined as the right or privilege of using and enjoying a thing which belongs to another, without impairing the substance—that is, the right to have the profits and use of the property but not its disposition or ownership. See, e. g., *Heintzen v. Binninger*, 79 Cal. 5, 6, 21 Pac. 277; *Schwartz v. Gerhardt*, 44 Ore. 425, 429, 75 Pac. 698, 699.<sup>12</sup> It seems clear that this Court used the term in the same sense in referring to original Indian title.

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<sup>12</sup> See also *Kaiser Co. v. Reid*, 30 Cal. 2d 610, 621, 184 P. 2d 879, 886; *Clark v. Lindsay Light Co.*, 405 Ill. 139, 142, 89 N. E. 2d 900, 902; *Modern Music Shop, Inc. v. Concordia Fire Ins. Co.*, 131 Misc. 305, 308, 226 N. Y. S. 630, 635.

The Indians may roam over the land for their hunting, fishing and berrying, and may otherwise use the land to perpetuate their existence, but they have no right in themselves to dispose of the soil. *Johnson v. McIntosh*, 8 Wheat. 543, 574. Nor can they sell timber standing on the land. *United States v. Cook*, 19 Wall. 591; cf. *United States v. Paine Lumber Co.*, 206 U. S. 467, 472-473. Indeed, the right is comparable to that of a mere licensee, e. g., a squatter on the public lands. See the dissenting opinion in *United States v. Tillamooks*, 329 U. S. 40, 58.

C. *Petitioner's asserted right is no more than "original Indian title."*—Our argument has been (*supra*, pp. 12-13) that from the time of discovery by the European sovereign the "original Indian title" could not in any sense be compared with "full proprietary ownership." Whatever rights the natives had in the soil prior to discovery were thereafter "necessarily, to a considerable extent, impaired." *Johnson v. McIntosh*, 8 Wheat. 543, 574. As further stated in the same opinion (p. 588):

An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recog-



nise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

It would be strange indeed if petitioner, alone of all the groups of natives in the New World, retained any greater rights in the soil as against the discoverers from Europe.

Petitioner contends, however, (Pet. Br. 14-28) that prior to the advent of Russia in Alaska it had the "full proprietary ownership" of its lands, and that such ownership was not impaired in any way throughout the period of Russian sovereignty. In so contending, petitioner asserts that its ancestors had a concept of land title somewhat akin to "full proprietary ownership" (Pet. Br. 9-11, 14-17),<sup>13</sup> but such assertion is of no avail to petitioner. For the fact remains that its title, if any, to the soil of Alaska was impaired by the coming of the Russians, just as in the case of the Indians in the 48 States the coming of other Europeans affected their "rights." After that

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<sup>13</sup> We do not in fact agree with petitioner's implication (Pet. Br. 9-11, 15-17) that the evidence establishes that it had reached such a degree of civilization that its concept of land title was similar to that of the discoverers. The excerpts quoted by petitioner do not present a complete picture. A survey of all the evidence will reveal that rather than any concept of title in soil, petitioner's concept of ownership was a mere right of exploitation. See Plaintiff's Exhibit No. 9, pp. 37-38; Defendant's Exhibit No. 3, pp. 18-23; Defendant's Exhibit No. 5, pp. 54-62; Defendant's Exhibit No. 6, pp. 11-19.

time, petitioner had only a right of occupancy known as "original Indian title."

Petitioner's answer (Pet. Br. 22-28) is that the concept of "original Indian title" is not applicable in Alaska because Russia had not asserted title by discovery as had the other European nations. But, as stated by Charles Sumner, chairman of the Senate Committee on International Affairs, in advocating before the Senate the ratification of the Treaty of 1867 (H. Ex. Doc. No. 177, 40th Cong., 2nd sess., p. 125): "The title of Russia to all these possessions is derived from prior discovery, which is the admitted title by which all European powers have held in North and South America."

It is unnecessary to delve into the history of Russia's explorations in and occupation of Alaska to find conclusive support for the Senator's statement.<sup>14</sup> In 1821, Emperor Alexander of Russia issued a ukase claiming an exclusive territorial right to the northwest coast of North America and the adjacent islands and prohibiting the navigation and fishery therein by all other nations, even to prohibiting approach within 100 miles. American State Papers, Foreign Relations, Vol. 4, pp. 857-861. The proprietary rights specified in this decree were based upon first discovery, first occupation, and peaceable and uncontested occupation

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<sup>14</sup> The story of Russia's explorations and occupation is set out in some detail in Senator Sumner's speech. H. Ex. Doc. No. 177, 40th Cong., 2nd sess., pp. 125-130, 143-154.

for more than half a century. American State Papers, Foreign Relations, Vol. 4, pp. 861-862. Obviously, this ukase is irrebuttable proof that Russia subscribed to the same doctrine of title by discovery as the other European nations (see *supra*, pp. 13-27, 43 ff.). And all of petitioner's contentions to the contrary are wholly fallacious.

Petitioner first contends (Pet. Br. 22-23) that the doctrine of title by discovery had no application to the area it claims because Russia did not interfere with petitioner's use or ownership of the soil or make grants of interests in the soil, but rather cautioned its subjects to respect the Indians' rights. However, there were similar circumstances in the rest of the continent (see *supra*, pp. 15-20, 24-27). The other European nations and our own did not seize all of the natives' lands in one fell swoop. For the preservation of the peace and other reasons of expediency it was customary to establish a temporary boundary beyond which the whites were forbidden to settle until more territory was needed for settlement, and it was usual to conciliate warlike tribes by leaving them to their own devices until control could be more readily exercised. H. Rept. No. 227, 21st Cong., 1st sess., pp. 6-7, 8-9.<sup>15</sup> But such circumstances

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<sup>15</sup> For example, the Treaty of August 3, 1795, 7 Stat. 49, with the Wyandots and other tribes provides that the United States will protect the tribes in the quiet enjoyment of their lands against all citizens and all other whites who intrude thereon (Article V), and that the United States shall withdraw its protection from all such intruders (Article VI).

did not affect the title by discovery. "A State is not obliged to exercise all its rights of sovereignty at once: \* \* \*. The policy of the country has always been to avoid provoking the Indians; and, even if it could be shewn, that the exercise of jurisdiction, in any case, was avoided, because the Indians objected, still the right could not be affected." H. Rept. No. 227, 21st Cong., 1st sess., pp. 9-10. Russia apparently followed the same policy in Alaska.<sup>16</sup>

Indeed, it is clear that this contention of petitioner is based upon a misconception that the "possession" necessary to perfect the inchoate title which is derived from discovery alone implies occupation or settlement of the entire area. But the requirement of possession is satisfied by any acts indicating that the territory has been appropriated and by actual use or occupancy of a part of the whole. Twiss, *Law of Nations in Time of Peace* (1861), pp. 162-170; Hall, *International*

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<sup>16</sup> Russia did, however, assert complete dominion and control over the territory. In the words of the Court of Claims (R. 19); "Such land as the Russian Government wanted for its use or the use of its licensees it took." It took lands it desired for forts and public buildings, and titles in fee were granted to employees of the Russian American Company. A. Ex. Doc. 177, 40th Cong., 2nd sess., p. 23; *Kinkead v. United States*, 24 C. Cls. 459, 460-464. And the Russian American Company had sublet its franchises in southeastern Alaska to England's Hudson Bay Company. H. Ex. Doc. 177, 40th Cong., 2nd sess., pp. 122-123. All this was done without any indication of payment having been made to the natives or their consent having been obtained.

*Law* (7th ed., 1917), pp. 103-108; Lawrence, *Principles of International Law* (7th ed., 1923), pp. 147-153; cf. Petitioner's Brief, pp. 43-45, where the argument is made that "possession" does not imply actual occupancy.

Thus, the assertion of title made in the ukase of 1821 and the visits by traders (R. 29-30) were sufficient, under the established principle of international law, to support good title in Russia by discovery. Lawrence, *Principles of International Law* (7th ed., 1923), pp. 151-152; Hall, *International Law* (7th ed., 1917), pp. 103-104. Indeed, the necessity for any greater proof has been obviated by the fact that the only competing nations agreed to Russia's claim, the United States by the Treaty of April 5, 1824, 8 Stat. 302, and Great Britain by a similar treaty in 1825. Wheaton, *International Law* (6th English ed., 1929), Vol. 1, pp. 342-343. And since under the treaty with Great Britain "Prince of Wales Island shall belong wholly to Russia" (see Treaty of March 30, 1867, 15 Stat. 539, 540), it is immaterial that the findings of the Court of Claims "offer no suggestion that the Russians ever 'discovered' even the coast of Prince of Wales Island on which the area here in question is located" (Pet. Br. 26). Such a political question had long since been decided in the proper forum.

Likewise, it is unimportant, in this context, that Russia made no attempt to introduce any

system of land ownership in the area claimed by petitioner (see Pet. Br. 23). Land titles were unknown among the peasants in the greater part of Russia (R. 30). Therefore, it is not strange that Russia did not treat the savage natives with any greater consideration. Moreover, it appears from the complete text of the Russian document of which petitioner has quoted an excerpt (Pet. Br. 23) that the chief reason for the lack of a system of land ownership was the savage character of the native inhabitants. H. Ex. Doc. No. 177, 40th Cong., 2nd sess., pp. 23-24; cf. Finding No. 16, R. 30. But, in any event, the quoted statement—"no attempts were made, and no necessity ever occurred, to introduce any system of land ownership" (Pet. Br. 23)—surely does not establish that petitioner had any greater interest than "original Indian title." Rather, it indicates that Russia did not grant to petitioner any greater interest in the lands.

Petitioner also argues (Pet. Br. 23-24) that Russia did not subscribe to the doctrine of title by discovery because it was not a Roman Catholic or maritime power, and was not actuated in its discovery by the need for territory. In view of the definite and conclusive proof that Russia did subscribe to the doctrine (*supra*, pp. 33-34), there is plainly no substance to the argument. But it may also be pointed out that the doctrine of title by discovery is not merely a *Roman Catholic* doc-



trine, but rather a principle adhered to by all the Christian nations (see *supra*, pp. 13 ff.). It cannot be denied that at the pertinent time Russia was a Christian nation. Likewise, while Russia may not properly have been described as a maritime "power," petitioner cannot deny that Russians sailed over the seas from Siberia to Alaska and acquired territory. Nor is the need for territory to meet the requirements of an expanding population the only reason for acquiring territory. The occupation of territory necessary for title by discovery is satisfied not only by settlement, but also by "taking from it its natural products." Hall, *International Law* (7th ed., 1917), p. 104. History shows that Russia did just that, especially in its fur trade.

Petitioner also apparently relies (Pet. Br. 9-11, 16-17) upon its asserted "relatively higher culture" as having prevented Russia's acquisition of title by discovery. However, as stated in Lawrence, *Principles of International Law* (7th ed., 1923), p. 148:

Tracts roamed over by savage tribes have been again and again appropriated, and even the attainment by the original inhabitants of some slight degree of civilization and political coherence has not sufficed to bar the acquisition of their territory by occupancy. All territory not in the possession of states who are members of the family of nations and subjects of Inter-



national Law must be considered as technically *res nullius* and therefore open to occupation.

Petitioner has not yet claimed to have been a member of the "family of nations."

Finally, petitioner contends (Pet. Br. 24-26) that by the time Russia had entered upon the scene the doctrine of title by discovery set out in *Johnson v. McIntosh* had been modified so that the bare fact of discovery was no longer sufficient to support a new title in the discovering nation. However, as we have shown, *supra*, pp. 13-15, the modification of the doctrine that discovery alone was sufficient came long before *Johnson v. McIntosh* and was recognized by Chief Justice Marshall's statement in 1823 (8 Wheat. at p. 573): "This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made \* \* \*, which title might be consummated by possession." Indeed, the declaration in connection with the ukase of 1821 that Russia's title was based upon first discovery, first occupation, and peaceable and uncontested occupation for more than 50 years (American State Papers, Foreign Relations, Vol. 4, pp. 861-862) proves that the Russian concept of title by discovery was exactly the same as that stated in the contemporaneous opinion in *Johnson v. McIntosh*. Hence, it is submitted that under the law of nations Russia acquired the full title to Alaska, including the lands claimed by petitioner, by

virtue of discovery and possession, and that consequently during the period of Russian sovereignty and thereafter petitioner had no greater right in the soil than a right of occupancy known as "original Indian title."

II. UNRECOGNIZED "ORIGINAL INDIAN TITLE" IS NOT A PROPERTY INTEREST THE TAKING OF WHICH IS COMPENSABLE UNDER THE FIFTH AMENDMENT

We have shown (*supra*, pp. 12-40) that petitioner's interest in the claimed lands was during the Russian sovereignty at most a right of occupancy known as "original Indian title." If such title had ever been formally acknowledged, recognized, and confirmed by the sovereign, a taking of such "recognized" title by the United States would be compensable under the Fifth Amendment. *Shoshone Tribe v. United States*, 299 U. S. 476. However, in the absence of such recognition "original Indian title" is not so compensable.

A. *The Tillamooks case is a holding that "original Indian title" is not compensable under the Fifth Amendment.*—Prior to the case of *United States v. Tillamooks*, 329 U. S. 40, 44, this Court had never had the occasion to pass upon the precise question whether "original Indian title" was compensable under the Fifth Amendment. In that case the Court of Claims had held that the United States was liable to the Indians under the Fifth Amendment for a taking of lands held under original Indian title. *Alcea Band of*

*Tillamooks v. United States*, 103 C. Cls. 494, 59 F. Supp. 934. In this Court the judgment of liability was affirmed by a vote of five justices to three, Mr. Justice Jackson not participating in the decision of the case. Mr. Chief Justice Vinson, in an opinion joined in by Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Murphy, held that the taking of original Indian title was compensable. Mr. Justice Black concurred in the affirmance of the judgment, but only because he was of the view that the special jurisdictional act under which the suit was brought "created an obligation" to make payment (329 U. S. at pp. 54-55). Mr. Justice Reed wrote a dissenting opinion, joined in by Mr. Justice Rutledge and Mr. Justice Burton, holding that the taking of unrecognized original Indian title was not compensable and that the jurisdictional act did not create any new obligation (329 U. S. at pp. 55-64). Thus, the Court was split four to four on the compensability of original Indian title, and the affirmance was on the ground that the Indians were "entitled to compensation under the jurisdictional act of 1935" (opinion of Mr. Chief Justice Vinson, 329 U. S. at p. 54).

The case was then remanded to the Court of Claims for a determination as to the amount of liability. While the *Tillamooks* case was pending in the Court of Claims, the Court of Appeals for the Ninth Circuit interpreted this Court's decision as a holding that original Indian title was

compensable (*Miller v. United States*, 159 F. 2d 997, 1001), leading to the statement in this Court's opinion in *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106, footnote 28:

We have carefully considered the opinion in *Miller v. United States*, 159 F. 2d 997, where it is held, p. 1001, that the Indian right of occupancy of Alaska lands is compensable. With all respect to the learned judges, familiar with Alaska land laws, we cannot express agreement with that conclusion. The opinion upon which they chiefly rely, *United States v. Alcea Band of Tillamooks*, 329 U. S. 40, is not an authority for this position. That opinion does not hold the Indian right of occupancy compensable without specific legislative direction to make payment.<sup>17</sup>

Thereafter, the Court of Claims entered a money judgment in the *Tillamooks* case, including interest on the value of the lands since the taking. *Alcea Band of Tillamooks*, 115 C. Cls. 463, 87 F. Supp. 938. This Court granted certiorari limited to the question presented by the award of interest and reversed such award, stating in a *per curiam* opinion that none of the prior

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<sup>17</sup> It is to be noted that this Court's disagreement did not extend to the other holdings in the *Miller* case that original Indian title had been extinguished in Alaska by the 1867 treaty (159 F. 2d at pp. 1001-1002) (see *infra*, pp. 72-79) and that the only Indian possessory rights to lands in Alaska protected or recognized by Congress were individual rather than tribal (159 F. 2d at p. 1005).

opinions had "expressed the view that recovery was grounded on a taking under the Fifth Amendment." *United States v. Tillamooks*, 341 U. S. 48, 49. Therefore, since interest is a part of the just compensation payable under the Fifth Amendment for a taking (*Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299), it is clear that the final disposition of the *Tillamooks* case is a holding by this Court that the taking of original Indian title is not compensable in the absence of a special jurisdictional act directing such payment. And the Court of Claims so interpreted the decision in deciding this case (R. 19-20), in which, of course, there is no special jurisdictional act upon which petitioner can rely (see Pet. Br. 12).<sup>18</sup>

Petitioner's brief (see especially Pet. Br. 57-62) has completely ignored this Court's second

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<sup>18</sup> The jurisdiction of the Court of Claims in this case rests upon 28 U. S. C. 1505 (originally section 24 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1059), which provides:

"The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

Obviously, this jurisdictional act can in no way be interpreted as "directing" payment for "Indian title."

opinion in the *Tillamooks* case (341 U. S. 48),<sup>19</sup> but apparently it would imply (Pet. Br. 12) that the holding in that case was influenced by the "item of interest looming up in astronomical amounts which overshadow that of the principal claim itself." But we shall show that, even if the *Tillamooks* decisions are laid aside, the law is that the taking of unrecognized "Indian title" is not compensable.

B. *Other authorities establish that unrecognized "Indian title" is not a property interest the taking of which is compensable under the Fifth Amendment.*—To conclude that the liability of the United States for the taking of lands occupied by Indians under original "Indian title" is the same as when lands occupied under a title formally recognized by the Government are taken, is to reject the teachings of the decided cases and history. Principles of international law have always been deemed to require a sovereign to respect private rights in property when acquiring sovereignty over territory formerly occupied by another member of the family of nations. *Barker v. Harvey*, 181 U. S. 481, 486.

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<sup>19</sup> The failure to notice that decision or even to brief the very point upon which the Court of Claims decided this case below (see Pet. Br. 61-62), i. e., the compensability of original Indian title, in petitioner's own words (Pet. Br. 28), "can not be explained away. *Avoidance on such a scale again can mean nothing less than a confession of inability to meet and answer*" the holding of the Court of Claims (italics in original).

But, as we have already shown (*supra*, pp. 13-27, 38-39), all territory not in the possession of states which are members of the family of nations has been deemed open to occupation by the discovering nation, and title to such territory vests in the occupying nation by virtue of the discovery. Thus, when the European nations came to North America and found it inhabited by uncivilized Indians, it was agreed by those nations, in accordance with principles of international law as understood by the then civilized powers of Europe, that each should have exclusive title by discovery to all territory reduced to possession. *Johnson v. McIntosh*, 8 Wheat. 543, 572-592. Since the lands were occupied by the Indians, the title thus asserted was necessarily said to be subject to the Indians' right of occupancy. Until the "Indian title" was extinguished, the sovereign granted the fee of the lands subject to the Indian right of occupancy, the colonists were forbidden to take possession of lands occupied by Indians without tribal consent, and the natives were permitted to use such lands. *Fletcher v. Peck*, 6 Cranch 87, 141-142; *Johnson v. McIntosh*, *supra*, at pp. 572-584; *Martin v. Waddell*, 16 Pet. 367, 409-410. See also *supra*, pp. 15 ff. The privileges accorded the Indians were merely a reflection of the practical necessities of the situation at that time. The Indians were warlike and numerically superior to the whites.



the sole power to extinguish the Indian occupancy resided in the sovereign, and it was important that the sovereign's hand in the execution of its power to extinguish the Indian right of occupancy should not be forced by third persons.

Though the Indian right of occupancy was thus protected against incursion by nonsovereign authority until extinguishment by the sovereign, that right was recognized as being only a *temporary* right. *Martin v. Waddell*, 16 Pet. 367, 409. There never has been any question as to the methods by which the United States could and did extinguish the Indian title. Both the very early decisions of this Court and the more recent ones contain explicit recognition of the paramount right of the United States to extinguish the Indian right of occupancy at will, by treaty, purchase, conquest, or the exercise of complete dominion adverse to the right of occupancy. *Fletcher v. Peck*, 6 Cranch 87, 142; *Johnson v. McIntosh*, 8 Wheat. 543, 587-592; *Clark v. Smith*, 13 Pet. 195, 201; *Martin v. Waddell*, 16 Pet. 367, 409; *Buttz v. Northern Pacific Railroad*, 119 U. S. 55, 66; *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339, 347; *Shoshone Indians v. United States*, 324 U. S. 335, 339. Thus, in the relatively recent *Santa Fe Pacific* case, *supra* (314 U. S. at p. 347), this Court stated:

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in

that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. \* \* \* And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.

And in the later *Shoshone* case the Court again stated (324 U. S. at p. 339) :

Since *Johnson v. McIntosh*, 8 Wheat. 543, decided in 1823, gave rationalization to the appropriation of Indian lands by the white man's government, the extinguishment of Indian title has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss.

The plain meaning of these expressions is that the means used by, and the terms upon which, the United States chose to extinguish Indian title were political questions to be determined by Congress, and that the Indians had no legal claim to compensation save in those instances where Congress elected to purchase or expressly recognized the Indian title to a specific area by treaty, agreement or statute. Petitioner's rights are, of course, no greater than those of other Indians since the treaty of cession (Treaty of March 30, 1867, 15 Stat. 539, 542) provided :

The uncivilized tribes will be subject to such laws and regulations as the United

States may, from time to time, adopt in regard to aboriginal tribes of that country.

The difference between recognized and unrecognized "Indian title" is made vivid in *Barker v. Harvey*, 181 U. S. 481, where claimants under a patent from the United States in confirmation of Mexican grants prevailed over Mission Indians of California who claimed rights by virtue of aboriginal possession. The decision being based on the fact that Mexico had never recognized the Indian title (p. 499), it was stated (pp. 491-492):

\* \* \* it could not well be said that lands which were burdened [by Mexican recognition] with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal.

Here is a clear statement of the paramount distinction between recognized and unrecognized "Indian title." Aboriginal possession creates against the United States only a temporary right

of occupancy which can be terminated at will without liability. It is a permissive right only. Title is in the United States with the Indians having a temporary possessory right terminable at will by the United States without Constitutional liability. *Sioux Tribe v. United States*, 316 U. S. 317; *Ute Indians v. United States*, 330 U. S. 169; *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 103-104. Only when a permanent right of occupancy is guaranteed by a treaty or act of Congress do the Indians acquire property rights entitled to protection by the Fifth Amendment.

This unprotected temporary right of occupancy might, of course, be ended by Congress by the payment of a sum of money, as a matter of grace. But the unquestioned power of the United States to extinguish unrecognized "Indian title" "by the sword" is an entirely independent and additional method of extinguishing that "title." If the exercise of that right is regarded as creating a liability to compensate for a title so extinguished, the power to extinguish the Indian title is converted from "by purchase or by the sword" into "by purchase or by the sword followed by purchase." In other words, the alternative rights always conceded the sovereign would be reduced to a sole right to purchase. But, "Conquest gives a title which the courts of the conqueror cannot deny." *Johnson v. McIntosh*, 8 Wheat. 543, 588. And to make compensation to

the conquered mandatory is a denial of the conqueror's title. It is a denial of the principle recognized by the Court "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." *Johnson v. McIntosh*, 8 Wheat. 543, 587. See also 8 Wheat. at 590-591.

C. *The actions of the United States and Congress at the time the Union was formed and shortly thereafter disclose an understanding that unrecognized "Indian title" was not a property interest protected by the Fifth Amendment.*— Apart from the decisions cited above, there are other materials showing that aboriginal "Indian title" was not recognized, prior to and after adoption of the Fifth Amendment, as a property right for which the Indians had to be paid upon its extinguishment. Following the American Revolution, seven of the original thirteen States claimed, as successors to the Colonies and Crown, the right to unappropriated or crown lands comprising vast areas to the west of their then recognized boundaries. Donaldson, *The Public Domain* (1883), p. 56. The claims of all seven, except New York, extended to the Mississippi River, then the international boundary (*ibid.*, p. 65). Dissatisfaction with the prospect of seven States having so much territory led to a demand by the States having no such claims, notably New Jersey, Delaware and Maryland, that the western territories should be held for the common

good of all the States (*ibid.*, pp. 60-61). This led to a recommendation by the Congress established under the Articles of Confederation that the lands be ceded to the United States, and to passage of a resolution by that Congress on October 10, 1780, in which it was provided that the unappropriated public lands that may be ceded or relinquished to the United States by any particular State "shall be disposed of for the common benefit of the United States" (*ibid.*, p. 64). Thereafter, the seven States having such claims ceded their western lands to the United States. The deeds of cession are set out in Donaldson, *The Public Domain* (1883), pp. 65-81. The cession by New York in 1781 was of "all the right, title, interest, jurisdiction, and claim" to the ceded lands "for the only use and benefit of such of the States as are or shall become parties to the Articles of Confederation." To the same effect, substantially, were the cessions of Massachusetts (1785), Connecticut (1786), and South Carolina (1787). The cession by Virginia (1784) was of "all right, title and claim, as well of soil as jurisdiction" and further provided that the lands ceded "shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the Confederation or federal alliance of the said States, Virginia inclusive, \* \* \* [and] shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose what-

soever." The cessions by North Carolina (1790) and Georgia (1802) were in substantially the same terms as those just quoted from the Virginia cession. The territories so ceded became the Northwest Territory.

This Court, at a very early date, in the case of *Johnson v. McIntosh*, 8 Wheat. 543, considered these cessions, and after noting that they were of lands "covered by Indians," said of the Virginia cession (p. 586) :

\* \* \* This grant contained reservations and stipulations, *which could only be made by the owners of the soil*; and concluded with a stipulation, that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation," &c., "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use, or purpose whatsoever." The ceded territory was occupied by numerous and warlike tribes of Indians; *but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.*

These historical facts make it clear that the States and the United States, in the period immediately preceding and following the adoption



of the Constitution, were of a common view that "Indian title" was not a legally compensable property right. It follows that "Indian title" was not deemed to be "private property" within the purview of the Fifth Amendment when it was ratified in 1791. That amendment does not purport to define "private property" and does not make a compensable property right out of an "Indian title" for which the Government was never legally liable to make payment. Certainly Georgia so understood the matter since her cession was *after* the ratification of the Fifth Amendment.

The view that the Indian right of occupancy was not made compensable by the Fifth Amendment was reflected in 1830 by the House Committee on Indian Affairs in a report on a bill (which became the Act of May 28, 1830, 4 Stat. 411) to authorize the President, by agreement, to remove Indians from treaty reservations to lands west of the Mississippi to be exchanged by the Government for reserved lands. The particular objective of the bill was to remove Indians from reservations in the Southern States, notably Georgia. While aboriginal "Indian title" was not actually involved, since the Indians were on treaty reservations, some opposition to the project was based on the view that the Indians originally owned the land and that they should not be removed. Thus it was that the House Committee on Indian Affairs dealt at length with the legal status of

original "Indian title" in its report (H. Rep. No. 227, 21st Cong., 1st Sess.). After noting (p. 2) that the Indians "have been taught to have new views of their right" the Committee proceeds to review the subject of Indian occupancy. Since the view thus articulated was that of persons to whom the Constitution was probably still a contemporary document, and was expressed at a time when the Indian problem was in sharp focus, a somewhat lengthy quotation therefrom is believed proper. The report stated (pp. 4-6):<sup>20</sup>

\* \* \* Thus it happened, that in all the colonies, the maxims and conduct adopted and pursued in relation to the Indians, were substantially the same. Humanity, and the religious feeling of the early adventurers forbade that they should be thrust with violence out of the land. The trade with the great tribes of the interior was profitable, and the peculiar mode of warfare practised by the Indians, soon brought the colonists to perceive the advantage of cultivating peaceable relations with all of them. This interest, however, was found, in the progress of the new societies, to be opposed to another great interest, which was, that their resources should be increased, and the demands of the cultivator supplied, by appropriating the wild land within their limits as speedily as possible. The difficulty that was felt in reconciling these two

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<sup>20</sup> Other quotations from this report are given above at pp. 24-27.

interests, lies at the foundation of the policy which was adopted in relation to the Indians; and the expedients which were resorted to, in order to effect an object so important, constitute the evidence of what the policy of the country was, from that time up to the formation of the Constitution. One of those expedients was, to appear to do nothing, which concerned the Indians, either in the appropriation of their hunting grounds, or in controlling their conduct, without their consent. It is not intended to be asserted that this device was employed by all the colonies, from their first settlement. It came, however, to be a general principle of action, upon this subject, at some period or other of their progress, and was adhered to, when found practicable, and in any degree consistent with their interests; but, in several instances, some of which occurred at an early, and others at a later period, the public interests were believed to require a departure from it; *but in all the acts, first of the colonies, and afterwards by the States, the fundamental principle, that the Indians had no rights, by virtue of their ancient possession, either of soil or sovereignty, has never been abandoned, either expressly or by implication.*

The rigor of the rule of their exclusion from those rights, has been mitigated, in practice, in conformity with the doctrines of those writers upon natural law, who, while they admit the superior right of agri-

culturists over the claims of savage tribes, in the appropriation of wild lands, yet, upon the principle that the earth was intended to be a provision for all mankind, assign to them such portion, as, when subdued by the arts of the husbandman, may be sufficient for their subsistence. To the operation of this rule of natural law may be traced all those small reservations to the Indian tribes within the limits of most of the old States. The General Court of Massachusetts fell short of coming up to the principle of natural law, but went beyond the general maxims of the period, when, in 1633, it declared, "that the Indians had the best right to such lands as they had actually subdued and improved." That Government, at the same time, asserted its right to all the rest of the lands within its charter, and actually parcelled them out by grant among the white inhabitants, leaving to them the discretionary duty of conciliating the Indians by purchasing their title. The General Assembly of Virginia asserted the unrestricted right of a conqueror, and, at the same time, conceded what the principles of natural law were supposed to require, when, in 1658, it enacted "that, for the future, no lands should be patented until fifty acres had been first set apart to each warrior, or head of a family belonging to any tribe of Indians in the neighborhood."

The recognition of this principle by the Federal Government may be seen, at this day,

in those small reservations which are made to individual Indians, or to the tribe itself, upon the relinquishment of the body of their lands. These reservations are made in deference to the principles of humanity, and because it has been found expedient to the interests of the Government making them. *No respectable jurist has ever gravely contended, that the right of the Indians to hold their reserved lands, could be supported in the courts of the country, upon any other ground than the grant or permission of the sovereignty or State in which such lands lie.* The province of Massachusetts Bay, besides the subdued lands already mentioned, during the early period of its history, granted other lands to various friendly tribes of Indians. Gookin, the great protector and friend of the Indians, about the time these grants were made, was asked, why he thought it necessary to procure a grant from the General Court for such lands as the Indians needed, seeing that "they were the original lords of the soil?" He replied, that "the English claim right to the land by patent from their King." No title to lands, that has ever been examined in the courts of the States, or of the United States, it is believed, has been admitted to depend upon any Indian deed of relinquishment, except in those cases where, for some meritorious service, grants have been made to individual Indians to hold in fee-simple.

Some of the colonies found it necessary, for the preservation of peace upon their frontiers, to establish a general Indian boundary, beyond which the white inhabitants were forbidden to settle, until authorized by law. These lines were generally in advance of the settlements. They were also commonly established in conformity with the stipulations made with the Indians in conferences or treaties. That these Indian boundaries were regarded as temporary, and implied no abandonment of the principle upon which the country was settled, is clear from many circumstances attending them. In some cases, the laws by which these lines were established did not forbid the appropriation of the lands embraced in them by patent. Patents, in two or three of the colonies or States, did actually issue under such circumstances; yet, these acts, implying, as they do, a most important act of ownership and sovereignty, have been solemnly adjudged valid by the judicial tribunals of the country most distinguished for their learning. *But the most decisive evidence of the light in which these reservations have always been viewed, in regard to the question of title, is to be found in the fact, that the Crown or the proprietors of Provinces, before the Revolution, and the States, after that event, succeeding as they did to the sovereignty over all the lands within the limits of their respective charters, have asserted the exclusive right, in themselves, to extinguish*



*the title to lands reserved to the Indians, until the Constitution was adopted. Since that time, the Federal Government has acted upon the same principle, in regard to lands belonging to the Government. If the principle upon which this right is asserted, and the effect it has had in practice, be examined, it will be found to be a complete recognition of the original rule which the nations of Europe acted upon in the first partition and settlement of the country. Some of the States have incorporated this right in their constitutions, as a principle of primary importance. Laws have been passed in all the rest, in which there are Indian reservations, granted by the States, declaring the same exclusive right.*

From this early authoritative survey, it appears that the Indians were recognized as having no property right in the lands which they occupied, that the practice of the Federal Government in setting aside specific lands for the Indians, either individually or in the form of tribal reservations, was not in recognition of any legal right in the Indians, but a continuation of a policy utilized by the colonies and later by the States in extinguishing "Indian title," and that such practice stemmed solely from humane motives and from expediency. A legal right in the Indians to compensation for lands occupied by them was never recognized.



*D. The authorities do not support the conclusion that there is a constitutional right to compensation for the taking of original "Indian title."*—We have shown from the opinions of this Court prior to the *Tillamooks* case that while the United States could, if it chose, extinguish "Indian title" by agreement with, or purchase from, the Indians, it was under no legal obligation to do so. It also appears that, prior to and following adoption of the Constitution and the Fifth Amendment, under the law as established both by the States which formed the Union and the Union itself, no legal obligation was recognized as resting upon the United States to compensate for extinguishment of unrecognized "Indian title." The manner in which that "title" should be extinguished was for Congress to determine, and compensation to the Indians, if any, was legally owing to them only if Congress determined to obligate the Government, either by agreement to purchase the "Indian title," or by having formally recognized and guaranteed the continuance of the "Indian title" by treaty, agreement, or statute prior to a taking.

Against this background, a conclusion that the same legal liability rests upon the United States for extinguishment of unrecognized "Indian title" as attaches in the case of a confirmed or recognized "Indian title" must fail. Such a conclusion misconceives the nature of the federal power to

extinguish Indian title, and misapplies the authorities. Thus, the decision of this Court in *Worcester v. Georgia*, 6 Pet. 515, and the opinion of Attorney General Wirt, 1 Op. A. G. 465, did not involve the question here presented. Cf. *United States v. Tillamooks*, 329 U. S. 40, 47-48. In both instances, the existence of the Indian tribe and its right to a specified area of land had been recognized by treaties with the United States resulting in the conclusion that the States of Georgia and Massachusetts had no authority to intrude upon the reserved areas. While the opinion in the *Worcester* case contains some language which might indicate that the United States could extinguish "Indian title" only by purchase, the opinion also recognized the existence of the power, which Chief Justice Marshall had earlier defined in *Johnson v. McIntosh*, 8 Wheat, 543, 587, "to extinguish the Indian title of occupancy, either by purchase or by conquest", and referred to the latter as remaining "dormant" (6 Pet. at 544). To say that a power remains dormant or unexercised confirms its existence; it does not prove its absence.

The language in *United States v. Creek Nation*, 295 U. S. 103, 110, to the effect that the guardianship of the United States "did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obli-

gation to render, just compensation for them" likewise has no application here. Cf. *United States v. Tillamooks*, 329 U. S. 40, 54. For the language quoted appears in the last sentence of the paragraph in which it is pointed out, at the outset, that the "Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States." 295 U. S. at 109.

*Johnson v. McIntosh*, 8 Wheat. 543, upon which reliance has also been placed, held only that an Indian tribe could not convey a good title to third parties to lands which the Indians occupied, *without the consent of the sovereign*. Moreover, that is the leading case proclaiming the right of the United States to extinguish "Indian title," either by purchase or by the sword, at the election of the United States. Nor was the question of the right of the United States to extinguish "Indian title" involved in either *Cramer et al. v. United States*, 261 U. S. 219, or *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339. In both, the United States sued to protect an "Indian title" *not extinguished by the United States*. The right to extinguish "Indian title" rests solely with the United States. The Indians enjoy it at the will of the United States, subject to its being extinguished at any time. It does not follow from the fact that the United States sues to protect the Indians' possession against

encroachments by third parties that "Indian title" is a property right against the United States. The Government in such instances is merely asserting its sovereign and exclusive right to extinguish "Indian title" and preserving for the Indians an occupancy which it has not itself seen fit to extinguish. In the two cases last cited, the question was not the power of the Government to extinguish "Indian title" or the terms on which it could do so, but whether that power had been exercised. In both cases, the answer was that it had not.

The language quoted in *United States v. Santa Fe Pacific Co.*, 314 U. S. 339, 345, from *Mitchel v. United States*, 9 Pet. 711, 746, that the Indian "right of occupancy is considered as sacred as the fee simple of the whites", does not stand in the way of the conclusion that a taking of unrecognized Indian title is not compensable. Similar expressions are to be found in *Cherokee Nation v. Georgia*, 5 Pet. 1, 48; *United States v. Cook*, 19 Wall. 591, 593; *Leavenworth &c. R. R. Co. v. United States*, 92 U. S. 733, 755; *Beecher v. Wetherby*, 95 U. S. 517, 526. However, in none of these cases was the present question involved, whether Indians have a legal right to be compensated by the United States for extinguishment of "Indian title." In none of them, save possibly the *Mitchel* case, was there involved a controversy between Indians and the United

States. Reference was made, rather, to the Indian rights against others than the Federal Government, and treaty rights of occupancy were involved. Cf. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565. In the *Mitchel* case, it was merely held that a conveyance of lands by an Indian, having an occupancy right, *confirmed by Spain before the cession of Florida to the United States*, was valid under Spanish law, and that the United States did not acquire the property under the cession.

Moreover, references to its sanctity were not intended to convey the thought that the Indian right of occupancy was the equivalent of a fee simple estate. Thus, in the case of *United States v. Cook*, 19 Wall. 591, 593, it was stated that "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, *but it is only a right of occupancy.*" It should also be noted that, notwithstanding this Court's use of such expressions in its decision in the *Santa Fe* case, the Court, in the same opinion, recognized their inapplicability to the present question when it stated (314 U. S. at 347):

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. \* \* \* And whether it be done by treaty, by the sword,

by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.

It is true that, until extinguished by the sovereign, the "Indian title" is as sacred as the fee against encroachments by third parties. But when the controversy has been between the United States and the Indians, this Court has been careful to indicate that it is the "pledged" or "perpetual", i. e., the *recognized*, right of occupancy which is as sacred as the fee. *United States v. Shoshone Tribe*, 304 U. S. 111, 116; *Shoshone Tribe v. United States*, 299 U. S. 476, 497. It is clear, therefore, that there is nothing in the decided cases indicating that the United States would be liable for extinguishing original, unrecognized "Indian title" or right of occupancy. To the contrary, even apart from *United States v. Tillamooks*, 341 U. S. 48, all the indications are the other way.

Even more equivocal than the judicial language upon which reliance has been placed to establish a constitutional obligation to pay for the taking of original "Indian title" is the fact that the Government has entered into numerous treaties with the Indians. As has already been indicated (*supra*, pp. 49, 56-59), that fact is at least as consistent with the view, here pressed, that resort to treaties is but a utilization of the Government's optional right to purchase where such action is



deemed more expedient or desirable than forcible acquisition. "Even where a reservation is created for the maintenance of Indians, their right amounts to nothing more than a treaty right of occupancy," the extinguishment of which may or may not be compensable depending upon whether or not its permanency was guaranteed. *Shoshone Indians v. United States*, 324 U. S. 335, 338; *Barker v. Harvey*, 181 U. S. 481, 491-492.

Nor is support for the petitioner's position to be found in the fact that in the Ordinance of 1787, providing a government for the Northwest Territory, it was stipulated that "the utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent."<sup>21</sup> Cf. *United States v. Tillamooks*, 329 U. S. 40, 48. That provision did no more than protect the "Indian title" against encroachment by others than the United States. It does not deal with the question of what, if anything, the Indians were entitled to *as against the United States* when the latter undertook to extinguish "Indian title." For if anything is clear in this field, it is that the right of

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<sup>21</sup> The balance of this article (Article III) reads "and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress: but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them." The entire Ordinance appears in a footnote in 1 Stat. at pages 51-52.



the United States to acquire Indian lands does not depend on the consent of the Indians; the sovereign possesses "exclusive power to extinguish the right of occupancy at will." Chief Justice Vinson in *United States v. Tillamooks*, 329 U. S. 40, 46.

### III. PETITIONER'S ORIGINAL INDIAN TITLE WAS NEVER "RECOGNIZED" BY EITHER RUSSIA OR THE UNITED STATES

We have urged that petitioner's interest in the lands in Alaska was, after the advent of Russia, nothing more than original Indian title (*supra*, pp. 12-40) and that such an interest is not compensable under the Fifth Amendment unless it has been "recognized" by the sovereign (*supra*, pp. 40-67). A mere recognition of the principle that the Indians had some rights flowing from their original Indian title, especially against private individuals, is not sufficient to impose the liability. There must be a specific recognition or confirmation of a specific claim by an Indian tribe to rights of occupancy in a definite area, such recognition being by treaty or Act of Congress. Cf. *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 107. Even a treaty must manifest an intention to do more than merely recognize the *status quo*--the mere fact of tribal occupancy and assertion of tribal rights. Cf. *Shoshone Indians v. United States*, 324 U. S. 335. Thus, before petitioner can be considered to have become vested with any

property rights as against the United States, it must be shown that the sovereign, either Russia or the United States, has recognized the original Indian title to the extent of guaranteeing undisturbed, exclusive, and perpetual occupancy. Cf. *Shoshone Tribe v. United States*, 299 U. S. 476; *Barker v. Harvey*, 181 U. S. 481, 491-492. Such "recognition" has never been given to petitioner's asserted title.

Petitioner categorically disclaims (Pet. Br. 27) any reliance upon "recognition" by Russia. And well it might, since in answer to an inquiry by the Secretary of State in 1867, the Russian government answered, "\* \* \* in this region no attempts were ever made, and no necessity ever occurred to introduce any system of land-ownership" (R. 30; see H. Ex. Doc. 177, 40th Cong., 2nd sess., pp. 22-24). The gist of petitioner's contention is, therefore, that Russia was content to preserve the *status quo*.

Petitioner relies (Pet. Br. 41-47) for the requisite "recognition" solely upon the Acts of May 17, 1884, 23 Stat. 24, 26, and of June 6, 1900, 31 Stat. 321, 330, both mentioned in the definition of possessory rights in section 1 of the Joint Resolution of August 8, 1947, 61 Stat. 920.<sup>22</sup> But neither statute purports to create any new rights.

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<sup>22</sup> Petitioner disclaims (Pet. Br. 43) any reliance upon section 14 of the Act of March 3, 1891, 26 Stat. 1095, 1100, which is also mentioned in the Joint Resolution. That section, in a statute entitled "An act to repeal timber-culture laws, and

Section 8 of the Act of May 17, 1884, 23 Stat. 24, 26, is a part of a statute providing a civil government for the newly acquired territory of Alaska. The particular Section sets up the district of Alaska as a land district and provides that the laws of the United States relating to mining claims shall be in effect in said land district. Then follow several provisos, the first of which, relied upon by petitioner as affording "recognition" of its Indian title, is:

*Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress \* \* \*.

It may be noted in passing that this language expressly negates any idea that the "Indians or other persons" have any "title", since it contemplates the possible future acquisition of "title". Obviously, as the Court of Claims held (R. 23), this proviso means no more than that the physical

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for other purposes," provides: "That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands belonging to the United States \* \* \* to which the natives of Alaska have prior rights by virtue of actual occupation \* \* \*." The disclaimer (Pet. Br. 43) is on the ground that the section "is of little import in the present connection for it did not even purport to create any new rights."

*status quo* was to be preserved, but that the question of legal rights was reserved for future determination. That this is so is well supported by the legislative history. In offering an amendment, later adopted, for the inclusion of the words "or now claimed by them," Senator Plumb of Kansas said (15 Cong. Rec. 530-531):

I do not know by what tenure the Indians are there nor what ordinarily characterizes their claim of title, but it will be observed that the language of the proviso I propose to amend puts them into very small quarters. I think about 2 feet by 6 to each Indian would be the proper construction of the language "actually in their use or occupation." Under the general rule of occupation applied to an Indian by a white man, that would be a tolerably limited occupation and might possibly land them in the sea.

\* \* \* Pending an investigation of this question I propose that the Indian shall at least have as many rights after the passage of this bill as he had before.

Senator Benjamin Harrison of Indiana, in charge of the bill, stated with respect to Senator Plumb's amendment (15 Cong. Rec. 531):

It was the object of the committee absolutely to save the rights of all occupying Indians in that Territory until the report which is provided for in another section of the bill could be made, when the Secretary

of the Interior could ascertain what their claims were and could definitely define any reservations that were necessary to be set apart for their use.

The section referred to by Senator Harrison was Section 12 of the 1884 Act (*infra*, p. 87), which in itself clearly demonstrates that Congress in Section 8 was merely preserving the *status quo* until a commission could examine into and report upon the condition of the Indians, "what lands, if any, should be reserved for their use, \* \* \* what rights by occupation of settlers should be recognized." It is submitted, therefore, that the 1884 Act affords no basis for a finding of "recognition," i. e., a guarantee of exclusive and perpetual occupancy. Cf. *Shoshone Indians v. United States*, 324 U. S. 335, 340-346.

Section 27 of the Act of June 6, 1900, 31 Stat. 321, 330, can have no greater effect. That Act (*infra*, pp. 87-88) is not only subject to the same infirmities as the 1884 Act, but in addition it apparently refers only to lands on which schools or missions are being conducted. Likewise, the Joint Resolution of August 8, 1947, 61 Stat. 920 (*infra*, pp. 88-89), is of no assistance to petitioner.<sup>23</sup> As the Court of Claims stated (R. 25): "All that Congress recognizes is that there is a legal dispute about the question of ownership." In the

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<sup>23</sup> In arguing this point (Pet. Br. 41-47), petitioner does not profess to rely on the Joint Resolution. However, at a later point of its brief (Pet. Br. 59) it indicates reliance upon the Joint Resolution as strengthening its argument.

words of the statute itself, it is not to be "construed as recognizing or denying the validity of any claims of possessory rights."<sup>24</sup>

IV. IN ANY EVENT, PETITIONER'S ALLEGED PROPERTY INTEREST, WHATEVER ITS NATURE, WAS EXTINGUISHED BY THE 1867 TREATY OF CESSION

We have now established, we believe, that petitioner's original Indian title has never been "recognized" by the sovereign and that a taking of its unrecognized interest would not be compensable under the Fifth Amendment. It follows, therefore, that the Court of Claims properly dismissed the suit as not stating a cause of action against the United States. But there is another, independent ground for decision, namely, that the United States acquired Alaska with the original Indian title extinguished.

The Ninth Circuit has held that whatever Indian title petitioner may have had under Russian rule was extinguished by the 1867 treaty of cession. *Miller v. United States*, 159 F. 2d 997, 1001-1002 (C. A. 9);<sup>25</sup> cf. *Kinkcad v. United States*, 150

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<sup>24</sup> For the reasons stated in this Point, it is clear that the argument petitioner makes from the cases of *United States v. Arredondo*, 6 Pet. 691, and *Kepner v. United States*, 195 U. S. 100 (see Pet. Br. 43-45), is entirely irrelevant. We, of course, have no quarrel with the principle stated in those cases as to the meaning of the term "possession" and have relied upon the same principle in another connection (*supra*, pp. 35-36).

<sup>25</sup> This portion of the *Miller* decision was not disapproved in *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106. See *supra*, p. 42.



U. S. 483. The Court of Claims expressed its doubt as to the effect of the provisions of the treaty relied upon by the Court of Appeals in the *Miller* case, and found it unnecessary to resolve the doubt (R. 20-22). In reaching this conclusion, the Court of Claims was influenced by a statement of Charles Sumner, Chairman of the Senate Committee on Foreign Relations, as to the reasons for the payment of an additional \$200,000.00 by the United States, and by the reasoning that Russia could not be expected, for the consideration of \$200,000.00, to "undertake the herculean task" of extinguishing Indian title (R. 20-22). However, granting that one of the reasons for the additional payment was to insure that the franchises of a fur company and ice company would be extinguished, this does not mean that there could not have been an additional reason, such as the extinguishment of original Indian title. And since Indian title could be extinguished in any manner at the will of the sovereign (*supra*, p. 46 ff.), it could be extinguished by the stroke of a pen as well as by more burdensome processes. Hence, the task of extinguishment was in no sense "herculean."<sup>26</sup> Indeed, the plain lan-

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<sup>26</sup> Indeed, the power to so extinguish "Indian title" in the treaty would be a matter of Russian rather than United States law. In finding it unnecessary to pass upon Russian law in a case arising under the same treaty, this Court said, "It is enough that the Emperor assumed to deal in this way with the property of his subjects." *Kinkead v. United States*, 150 U. S. 483, 492.



guage of the treaty can lead only to the conclusion that whatever tribal rights existed in Alaska at the time were deliberately extinguished by the treaty.

Article II of the treaty (*infra*, pp. 83-84) recites that the cession of territory and dominion includes "the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not *private individual property*." An exception was made in the case of churches which continued to be the property of the Greek Oriental Church, but the treaty made no exception in the case of *tribal* Indian property rights, which can by no stretch of the imagination be considered the equivalent of "private individual property." Cf. *Choate v. Trapp*, 224 U. S. 665, 671-672; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307; *Cherokee Trust Funds*, 117 U. S. 288, 308-309. Article III (*infra*, p. 84) offers further evidence that tribal rights were to be thereafter non-existent. While providing that the inhabitants of the territory, with the exception of the uncivilized native tribes, were to be protected in the free enjoyment of their property, it was declared that the uncivilized tribes will be "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." In other words, insofar as tribal Indians were concerned the United States was starting with a clean slate. Finally, Article VI (*infra*,

p. 85) declared that the cession of territory was “free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, *except merely private individual property holders.*” Clearly, this language is broad enough to include encumbrances flowing from the tribal right of occupancy. In view of the plain language used in the articles cited, it was unnecessary to declare any more specifically that Indian title was extinguished.

Petitioner’s reliance (Pet. Br. 29–32) upon other treaties of cession and judicial decisions interpreting such treaties is entirely misplaced. We do not agree that the treaties relied upon show “recognition” of compensable interests in the Indians concerned. But in any event the language in such treaties is distinguishable from that of the 1867 treaty, which clearly denies the existence of tribal property interests. Whatever the term “private property” in the Louisiana Purchase Treaty of April 30, 1803 (8 Stat. at 202) and the Florida Purchase Treaty of February 22, 1819 (8 Stat. at 254), may include, the term “private individual property” used in the 1867 treaty with Russia clearly excludes tribal interests. Moreover, in Article VI of the 1803 treaty with France (8 Stat. 200, 202) the United States promised “to execute such treaties and articles as may have been agreed between Spain

and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon."

On the other hand, other treaties of cession (to our knowledge) do not include provisions like those in the 1867 treaty excluding the Alaska natives from the guaranteed protection of property rights and declaring that they will be "subject to such laws and regulations" as the United States may adopt (Article III, *infra*, p. 84); granting all property not "private individual property", with a specific exception for property of the Greek Oriental Church, but none for the Indians (Article II, *infra*, p. 83); and declaring that the property ceded was encumbered only by "private individual property holders" (Article VI, *infra*, p. 85). Such strange provisions demonstrate an intention that all tribal interests were to be extinguished by the treaty. Consequently, the United States by the 1867 treaty acquired full title to all lands in the territory not privately owned, unaffected by a tribal right of occupancy. *Miller v. United States*, 159 F. 2d 997, 1002 (C. A. 9); *United States v. Berriqan*, 2 Alaska 442, 448-449 (D. Alaska).

The reason for a different treatment of Indian tribes in 1867 over that previously accorded the Indians is not hard to find. Beginning at least with the period of the War Between the States and extending to the enactment of the Act of

March 3, 1871, 16 Stat. 544, 566, 25 U. S. C. 71, which brought to an end the policy of entering into treaties with Indian tribes, there was strong sentiment for shifting our Indian policy from treating with Indians on a tribal basis to assimilating the Indians as individuals. See Cohen, *Handbook of Federal Indian Law* (1942), pp. 14-20, 64-67. This changing policy must have had its impact upon our acquisition of Alaska.

In brief, it seems clear that tribal rights were deliberately terminated at the time of cession. Indeed, if any doubt as to the extinguishment of Indian title can arise from the 1867 treaty, that doubt is whether Indian title had not been extinguished long before. We have shown (*supra*, pp. 15-20, 24-27, 34-35) that the other European nations and our own had customarily forbade both their own subjects and particularly those of other nations from entering for any purpose into lands occupied by Indians. But in Article IV of the treaty of April 5, 1824, 8 Stat. 302, 304, Russia authorized the citizens of the United States to frequent the interior seas, gulfs, harbors, and creeks in Alaska for the purpose of fishing and trading with the natives. This grant of permission to invade the lands of the Indians and take therefrom the product of the waters indicates that even at that early date the Indian right of occupancy had considerably deteriorated.

We should not bring this Point to a close without some comment on petitioner's references to administrative interpretation of the quality of aboriginal rights in Alaska (Pet. Br. 36-41, 59). Petitioner realizes that its discussion "may not actually rise to the full dignity of argument" (Pet. Br. 36), and that in the sphere of the control and disposition of the territories and other property of the United States Congress is supreme (Pet. Br. 33-34). No matter what are the views and vacillations of the executive branch of the Government, those views are not controlling. And it is clear that the judicial branch has in no way acceded to the administrative interpretations on which petitioner relies. To the contrary, this Court has held that Alaskan Indian reservations established under the authority of the Act of May 1, 1936, 49 Stat. 1250, 48 U. S. C. 358a, are "subject to the unfettered will of Congress." *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106. And the Hydaburg Reservation established by a former Secretary of the Interior under his interpretation of the quality of Indian rights (Pet. Br. 40-41) was declared to have been invalidly created because the Indians had no subsisting rights in the area. *United States v. Libby, McNeil & Libby*, 107 F. Supp. 697 (D. Alaska). The administrative interpretations relied upon stand alone, without even unanimity within the executive branch. As pointed out in the Memorandum for the United States on the petition for certiorari

(pp. 10, 14-18), there is now agreement among the interested executive departments that no compensable rights flow from unrecognized original Indian title in Alaska or elsewhere.

V. THE QUESTIONS OF WHETHER THERE HAS BEEN AN ABANDONMENT OF PETITIONER'S ALLEGED INTEREST AND WHETHER THE EXECUTION OF THE TIMBER SALE CONTRACT CONSTITUTED A TAKING OF THAT INTEREST ARE NOT READY FOR REVIEW BY THIS COURT

Petitioner (Pet. Br. 47-57) also discusses the questions of whether there has been an abandonment of its alleged interests by less intensive use of the areas claimed, and of whether the execution of the timber sales agreement in itself constituted a taking of petitioner's alleged rights in the area. In view of the discussion in the preceding points of this brief, we do not believe that these two issues will be reached in this Court. Moreover, since the Court of Claims has neither passed upon nor even discussed these questions (R. 25-26, 32), it appears more appropriate that, if it should develop that these questions are material in the decision of the case, they be remanded to the court below for the first determination. This is particularly so with reference to the question of abandonment. The very statement of the question by the Court of Claims (R. 7) indicates that it was to be answered only in the event of an answer favorable to the petitioner to the three preceding questions, and that



even then the answer was to be only whether or not certain evidence constituted *prima facie* evidence of termination or loss of rights. Obviously, as petitioner recognizes (R. 9), there would necessarily be further proceedings under Rule 38(b) of the Court of Claims before any final determination on the issue of abandonment.

Under these circumstances, rather than extending an already lengthy brief, we have not briefed these questions. However, we would of course be pleased to comply with any indication by this Court that such questions be briefed or argued.

#### CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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SEPTEMBER 1954.



## APPENDIX

1. The Treaty of March 30, 1867, 15 Stat. 539, provides:

\* \* \* \* \*

### ARTICLE I

His Majesty the Emperor of all the Russias agrees to cede to the United States, by this convention, immediately upon the exchange of the ratifications thereof, all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit: The eastern limit is the line of demarcation between the Russian and the British possessions in North America, as established by the convention between Russia and Great Britain, of February 28-16, 1825, and described in Articles III and IV of said convention, in the following terms:

“Commencing from the southernmost point of the island called Prince of Wales Island, which point lies in the parallel of 54 degrees 40 minutes north latitude, and between the 131st and the 133d degree of west longitude, (meridian of Greenwich,) the said line shall ascend to the north along the channel called Portland channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the

mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude, (of the same meridian;) and finally, from the said point of intersection, the said meridian line of the 141st degree, in its prolongation as far as the Frozen ocean.

"IV. With reference to the line of demarcation laid down in the preceding article, it is understood—

"1st. That the island called Prince of Wales Island shall belong wholly to Russia," (now, by this cession, to the United States.)

"2d. That whenever the summit of the mountains which extend in a direction parallel to the coast from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude shall prove to be at the distance of more than ten marine leagues from the ocean, the limit between the British possessions and the line of coast which is to belong to Russia as above mentioned (that is to say, the limit to the possessions ceded by this convention) shall be formed by a line parallel to the winding of the coast, and which shall never exceed the distance of ten marine leagues therefrom."

The western limit within which the territories and dominion conveyed, are contained, passes through a point in Behring's straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern, or Ignalook, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen ocean. The same western limit, beginning

at the same initial point, proceeds thence in a course nearly southwest through Behring's straits and Behring's sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper island of the Kormanderski couplet or group in the North Pacific ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian islands east of that meridian.

## ARTICLE II

In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. It is, however, understood and agreed, that the churches which have been built in the ceded territory by the Russian government, shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship therein. Any government archives, papers, and documents relative to the territory and dominion aforesaid, which may be now existing there, will be left in the possession of the agent of the United States; but an authenticated copy of such of them as may be required, will be, at all times, given by the United States to the Russian government, or to

such Russian officers or subjects as they may apply for.

### ARTICLE III

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

### ARTICLE IV

His Majesty the Emperor of all the Russias shall appoint, with convenient despatch, an agent or agents for the purpose of formally delivering to a similar agent or agents appointed on behalf of the United States, the territory, dominion, property, dependencies and appurtenances which are ceded as above, and for doing any other act which may be necessary in regard thereto. But the cession, with the right of immediate possession, is nevertheless to be deemed complete and absolute on the exchange of ratifications, without waiting for such formal delivery.

### ARTICLE V

Immediately after the exchange of the ratifications of this convention, any fortifi-

cations or military posts which may be in the ceded territory shall be delivered to the agent of the United States, and any Russian troops which may be in the territory shall be withdrawn as soon as may be reasonably and conveniently practicable.

#### ARTICLE VI

In consideration of the cession aforesaid, the United States agree to pay at the treasury in Washington, within ten months after the exchange of the ratifications of this convention, to the diplomatic representative or other agent of his Majesty the Emperor of all the Russias, duly authorized to receive the same, seven million two hundred thousand dollars in gold. The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.

#### ARTICLE VII

When this convention shall have been duly ratified by the President of the United States, by and with the advice and consent of the Senate, on the one part, and on the other by his Majesty the Emperor of all the Russias, the ratifications shall be exchanged at Washington within three

months from the date hereof, or sooner, if possible.

In faith whereof, the respective plenipotentiaries have signed this convention, and thereto affixed the seals of their arms.

Done at Washington, the thirtieth day of March, in the year of our Lord one thousand eight hundred and sixty-seven.

[L. S.] WILLIAM H. SEWARD.

[L. S.] EDOUARD DE STOECKL.

2. Sections 8 and 12 of the Act of May 17, 1884, 23 Stat. 24, provide:

SEC. 8. That the said district of Alaska is hereby created a land district, and a United States land-office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land-office, and the clerk provided for by this act shall be ex officio receiver of public moneys and the marshal provided for by this act shall be ex officio surveyor-general of said district and the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further*, That parties who have located mines or mineral



privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: *And provided also*, That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

SEC. 12. That the Secretary of the Interior shall select two of the officers to be appointed under this act, who, together with the governor, shall constitute a commission to examine into and report upon the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education, what rights by occupation of settlers should be recognized, and all other facts that may be necessary to enable Congress to determine what limitations or conditions should be imposed when the land laws of the United States shall be extended to said district; and to defray the expenses of said commission the sum of two thousand dollars is hereby appropriated out of any moneys in the Treasury not otherwise appropriated.

3. Section 27 of the Act of June 6, 1900, 31 Stat. 321, 48 U. S. C. 356, provides:



SEC. 27. The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, and the land, at any station not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in the section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the Secretary of the Interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong; but nothing contained in this Act shall be construed to put in force in the district the general land laws of the United States.

4. The Joint Resolution of August 8, 1947, 61 Stat. 920, provides:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That "possessory rights" as used in this resolution shall mean all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes, native villages, native individuals, or other persons, and which have not been confirmed by patent or court decision or included within any reservation.*

SEC. 2. (a) The Secretary of Agriculture, in contracts for the sale, or in the sale, of national forest timber under the provisions of the Act of June 4, 1897 (30 Stat. 11, 35), as amended, is authorized to include timber growing on any vacant, unappropriated, and unpatented lands within the exterior boundaries of the Tongass National Forest in Alaska, notwithstanding any claim of possessory rights. All such contracts and sales heretofore made are hereby validated.

(b) The Secretary of the Interior is authorized to appraise and sell such vacant, unappropriated, and unpatented lands, notwithstanding any claim of possessory rights, within the exterior boundaries of the Tongass National Forest as, in the opinion of the Secretary of the Interior and the Secretary of Agriculture, are reasonably necessary in connection with or for the processing of timber from lands within such national forest, and upon such terms and conditions as they may impose.

(c) The purchaser shall have and exercise his rights under any patent issued or contract to sell or sale made under this section free and clear of all claims based upon possessory rights.

SEC. 3. (a) All receipts from the sale of timber or from the sale of lands under section 2 of this resolution shall be maintained in a special account in the Treasury until the rights to the land and timber are finally determined.

(b) Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights to lands or timber within the exterior boundaries of the Tongass National Forest.

OCT 7 1954

On Writ of Certiorari to the Court of Claims

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1954

\_\_\_\_\_  
No. 43  
\_\_\_\_\_

THE TEE-HIT-TON INDIANS, an identifiable group of  
of Alaska Indians, *Petitioner*,

v.

THE UNITED STATES.

\_\_\_\_\_  
**BRIEF OF THE ATTORNEY GENERAL OF IDAHO.  
AMICUS CURIAE**  
\_\_\_\_\_

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AMICUS CURIAE**

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*To the Honorable, the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of  
the United States:*

This brief is respectfully submitted on behalf of the  
State of Idaho.

**NATURE OF THE STATE'S INTEREST**

The State of Idaho has within the state five tribes,  
bands, or communities of Indians each of whom has pend-  
ing in the Indian Claims Commission a case against the

United States depending in one way or another upon the ownership or occupancy by the particular group of lands within the state prior to the time those lands were seized or purchased by or through the United States.<sup>1</sup>

In recent sessions of Congress there has been a pronounced movement towards and an announced policy of "withdrawal" or "termination" of federal supervision over and responsibility for Indians and Indian tribes.<sup>2</sup>

The fruition of this policy as applied to the Indians of Idaho will eventually leave this state the serious problems of providing community and social services and supervising the adjustment of its Indian citizen to the proposed new status of unregulated responsibility. This task cannot be intelligently pursued without ascertaining what assets the Idaho tribes have with which to plan their future, which in turn requires that they have a forum for the prompt and full disposition of their land claims against the United States.<sup>3</sup> It is the interest of this *amicus* to see

<sup>1</sup>The tribes referred to, together with docket numbers of their respective cases in the Indian Claims Commission, are as follows:

Shoshone-Bannock Tribes of the Fort Hall Reservation, Nos. 326, 366, and 367.

Coeur d'Alene Tribe, DeSmet, Idaho, No. 81.

Kootenai Indians of Idaho, Bonners Ferry, Idaho, No. 154.

Nez Perce Tribe, Lapwai, Idaho, No. 175.

<sup>2</sup>H. Con. Res. 198 expresses " \* \* \* the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; \* \* \* " and expresses the sense of Congress that " \* \* \* at the earliest possible time \* \* \* " all Indian tribes and members thereof in states not including Idaho, " \* \* \* should be freed from Federal supervision and control \* \* \* "

<sup>3</sup>Note that following determination of the claims of the Menominee Indians of Wisconsin, Congress has adopted so-called "termination" legislation, which involves planning on the basis of, among other assets, the more than \$8,000,000 of a Court of Claims award. Act of August 15, 1953, c. 505, 67 Stat. 588; see Joint Hearings of the Committees on Interior and Insular Affairs on

that the purposes of the Indian Claims Commission Act are not frustrated by an improvident interpretation which would deny the Indians an opportunity to settle their ancient grievances against the federal government before its responsibilities to the Indians of Idaho are terminated.

### STATEMENT

Respondent, the United States, undertook to sell all the merchantable timber on certain lands in Alaska, to which petitioner, the Tee-Hit-Ton clan or group of Indians, asserted possessory rights—*i.e.*, they asserted "original Indian title" or right of occupancy. For the taking of the interest in its lands petitioner brought action in the Court of Claims under Section 1505 of the Judicial Code. That section of the Judicial Code accords a jurisdiction which, as to its substantive features, originally had been accorded the Court of Claims in the Indian Claims Commission Act, Section 24 (c. 959, 60 Stat. 1049, 1055).

The Court of Claims found (R. 19-20) that petitioner had no compensable interest in the lands, and as a result, it sustained the motion of respondent to dismiss the action (R. 32-35).

### QUESTION PRESENTED

Whether the petition for certiorari was providently granted, *i.e.*,—

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"Termination of Federal Supervision Over Certain Tribes of Indians," 83d Cong., 2d Sess., part 6, p. 589 *et passim*. Intelligent planning is not possible until the value of the claims, on the basis of a full and fair award, is established. Mere denial of the claims on a jurisdictional technicality does little but throw the particular Indians back as petitioners to Congress for further jurisdictional legislation. As stated by the Chairman of the House Committee, Mr. Jackson, in the debate on H.R. 4497, 79th Cong., 1st Sess., which became the Indian Claims Commission Act, "If you are ever going to settle this Indian question in the United States, you have to settle these claims." See debate May 20, 1946, 92 Cong. 5314.



Whether it was correctly represented by the parties<sup>4</sup> that this case involved, among other important matters, the question whether the taking of lands owned by right of "original Indian title" is compensable in cases brought before the Indian Claims Commission. To the extent this Court granted the petition on that representation (as distinguished from other grounds advanced), it is the position of this *amicus* that the Court was imposed upon and the writ should be dismissed as improvidently granted.

Alternatively, whether any determination by the Court in this case, founded on the grant of jurisdiction to the Court of Claims in Section 24 of the Indian Claims Commission Act (now in substance appearing as 28 U.S.C. § 1505), could have any effect, as represented by the parties, on the actions brought before the Indian Claims Commission pursuant to Section 2(4) of the same act (25 U.S.C. § 70a(4)).

### ARGUMENT

The cases before the Indian Claims Commission which involve directly or indirectly the question of Indian title generally have been filed under a grant of jurisdiction (Section 2 of the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1050; 25 U.S.C. § 70a) more extensive than that accorded to the court below (Jud. Code § 1505). In the court below, as to claims arising

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<sup>4</sup> The petition for writ of certiorari states, page 12, that the importance of review in this case is enhanced by the fact that there is a large number of pending or potential "stateside" cases which would appear to be affected by the ruling that original Indian title would not be a right on which a suit against the United States could be based. Petitioner's statement is rather modest, recognizing as it does that there may be distinctions in the jurisdictional acts on which most claims are based as opposed to the claim under review. No such modesty is apparent in the statement of the respondent (Memorandum for the United States, pp. 9-10), which asserts without recognizing distinctions in the jurisdictional acts of this case and Indian Claims Commission cases that out of 800 claims asserted before the Indian Claims Commission, about half involve in some form or other the question of compensability of "original Indian title."

after the date of the Indian Claims Commission Act, a tribe may sue only for claims "arising under the Constitution, laws, treaties of the United States, or Executive orders of the President" or within a class of claims which would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group. As to claims before the date of the Indian Claims Commission Act, similar action equally might be brought in the Indian Claims Commission under identical jurisdictional language. But beyond and quite in addition to that, the Indian Claims Commission was given jurisdiction of specific classes of ancient grievances, and specifically of "claims arising from the taking by the United States \* \* \* of land owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant." Sec. 2(4).

It is under this provision that most of the original Indian title cases have been brought before the Commission.<sup>5</sup> However, the Commission by its rulings in cases brought under Section 2(3) of the act for the taking of lands by the United States for an unconscionable consideration,<sup>6</sup> has placed original Indian title in issue in those cases by requiring the claimant to show that it had

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<sup>5</sup> In those cases the United States—sometimes without any pretense of formality—dealt with the lands, claimed to have been held by the Indian tribe under Indian title, as if they were its own, dispossessing the original Indian owners and users of those lands. Sometimes this dispossession was done only after much bloodshed and violent opposition, as in the case of the heroic struggle of Chief Joseph of the Nez Perce to resist removal from the land of his birth and requiring the military might of the United States to remove him, and sometimes it was done peacefully, as in the case of the Kalispel Indians, who with their passion for peace did not make war in resistance to the patenting to white settlers of the lands theretofore held by them.

<sup>6</sup> Sec. 2(3) of the Act (25 U.S.C. § 70a(3)) provides for hearing and determination of " \* \* \* (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; \* \* \* "

the Indian title which by treaty it purported to cede to the United States. See *Pawnee Tribe of Oklahoma v. United States*, 124 C. Cls. 324, 329, 109 F. Supp. 860, reversing (on other issues) 1 Ind. Cls. Com. 245, 252; *Klamath and Modoc Tribes and Yahooskin Band of Snake Indians v. United States*, 2 Ind. Cls. Comm. 684, 686-687 (decided April 9, 1954).

To suggest that such claims filed under the Commission's jurisdiction will in some manner be determined by the decision of the court below in the instant case on a claim filed under the more limited jurisdiction is almost an imposition upon this Court. The separateness of the jurisdictional provisions is most readily shown in parallel treatment of the sections of the Indian Claims Commission Act which accorded jurisdiction to the Commission and to the Court, respectively. We call attention to the fact that sub-section (4) of the section (Section 2) relating to Indian Claims Commission jurisdiction, and to some extent sub-section (3), under which the overwhelming bulk of "Indian title" cases are heard by that Commission, find no counterpart in the jurisdictional provisions relating to the Court of Claims:

Indian Claims Commission  
Section 2

Sec. 2. The Commission shall hear and determine the following claims against the United States

on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska:

(1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;

Court of Claims  
Section 24 (now 28 U.S.C. 1505)

Sec. 24. The jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act

in favor of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska

whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive orders of the President,

(2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;

(3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;

(4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and

(5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

Historically the general jurisdictional grants authorizing the Court of Claims to hear merely claims "arising under or growing out of the Constitution, or any treaty or agreement, statute or Executive order" involving a particular tribe have always been strictly construed so as to preclude the recovery on a claim based upon original Indian title. *United States v. Alcea Band of Tillamooks*,

or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

329 U.S. 40, 45.<sup>7</sup> Such decisions have sent the Indians back to Congress for an express grant of authority to sue for the taking of their Indian title. In *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 44-46, 54-55, this Court affirmed the Court of Claims in its finding of liability on the part of the United States for a taking of lands held under original Indian title. And in the Indian Claims Commission Act, the language of Section 2(4) has likewise accorded jurisdiction to the Commission to allow recovery for the taking of original Indian title.

Accordingly, whatever dispute may be made as to the scope of the conventional language according jurisdiction to the Court of Claims (Jud. Code, § 1505), the determination of that question in the instant case can have no bearing on the additional, express jurisdiction accorded to the Indian Claims Commission by Section 2 of the Act.

### CONCLUSION

Insofar as this Court was induced to grant certiorari on the representation that the determination of the question of "compensability" of Indian title under the jurisdiction of the Court of Claims would have some bearing on cases involving Indian title under the jurisdiction of the Indian

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<sup>7</sup> "Prior to 1929, adjudications of Indian claims against the United States were limited to issues arising out of treaties, statutes, or other events and transactions carefully designated by Congress. This Court has always strictly construed such jurisdictional acts and has not offered judicial opinion on the justness of the handling of Indian lands, except in so far as Congress in specific language has permitted its justiciable recognition." (p. 45)

See also *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 337, 339, where this Court held (contrary to the position of the then Attorney General of Idaho) that under the standard jurisdictional language the Indians could not recover for the taking of lands proved to have been held by original Indian title, and *Duwamish Indians v. United States*, 79 C. Cls. 530, cert. den. 295 U.S. 755.

Claims Commission, to that extent this Court has been imposed upon and the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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U.S. Supreme Court,  
OCT 8 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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**No. 43**

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THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE GROUP  
OF ALASKA INDIANS,

*Petitioner*

*v.*

THE UNITED STATES,

*Respondent*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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**BRIEF ON BEHALF OF THE STATE OF NEW MEXICO  
AS AMICUS CURIAE**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE GROUP  
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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**BRIEF ON BEHALF OF THE STATE OF NEW MEXICO  
AS AMICUS CURIAE**

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**Statement of Interest of the State of New Mexico**

There are over 40,000 Indians in New Mexico—Navajos, Apaches, Pueblos and Zunis. The Navajos, Apaches and Pueblos have claims pending before the Indian Claims Commission under the Indian Claims Act of August 13, 1946, c. 959, 60 Stat. 1049.<sup>1</sup> The Government apparently

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<sup>1</sup> Navajo: Dockets Nos. 69, 229, 299, 353; Apaches: Docket Nos. 22, 30, 32, 48, 49, 182, 223, 257, 258, 259; Pueblos: Dockets Nos. 137, 211, 227, 266, 355, 356, 357 and 358. See H. Rept. 2503, 82d Cong., 2d sess. (1952) pp. 471, 232 and 543.

expects the decision in the *Tec-It-Ton* case to control or affect the claims before the Indian Claims Commission (Memorandum for the United States in response to petition for certiorari, pp. 9-10). The Indian citizens of New Mexico are entitled to have their claims adjudicated on the merits through the Indian Claims Act as intended by Congress and not to have them fixed by a decision in a case arising under the general jurisdiction of the Court of Claims. The interests of the Indians of New Mexico are not represented by petitioner in the case at bar. Ever since the decision of this Court in *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339, 346, it has been understood in New Mexico that no distinction is made among the Indian tribes in this country with respect to the nature of their aboriginal title. Here, however, the petitioner distinguishes its claim on the ground that original title in Alaska is not the same as aboriginal Indian title in the States. In addition, the petitioner's claim turns on the jurisdiction of the Court of Claims, not the Indian Claims Commission. It is the interest of the State of New Mexico to advance and protect the rights of its Indian population and this brief *amicus* is submitted to show that there is no controlling connection between the claim at bar and aboriginal title claims before the Indian Claims Commission.

### Argument

I. *Claims based on original Indian title are compensable under the Indian Claims Act without regard to the holding below.*

In this case the Court of Claims has held that as against the United States an Indian tribe has no right in land held by original Indian title "unless Congress had recognized the tribe's interest as a legal interest" (R, 26). This is but an oblique way of saying that original Indian title is not com-

pensible under the Fifth Amendment. This claim for the taking in 1951 of an interest in land exclusively used and occupied by an Alaskan Indian tribe—that is, land held by original Indian title—is an isolated case. It cannot arise in the future in the 48 States since all original Indian title in the States was long ago extinguished.<sup>2</sup> The only possibility of such claims in the future would be limited to Alaska and would be controlled by the six year statute of limitations (28 U. S. C. 2501). This puts the claim on a par with those of non-Indians and should entitle it to the same constitutional protection extended to non-Indians. Only clear and compelling reasons should lead this Court to hold that the Government, without paying compensation, may deprive an Indian tribe of the country it possesses and has exclusively occupied from time immemorial.

But, the Government has not dealt with the case in this context. This case is merely a weapon. The real target is the claims filed before the Indian Claims Commission under the Indian Claims Act of August 13, 1946, c. 959, 60 Stat. 1049 (25 U. S. C. 70 et seq.). Thus the Government has represented that the decision below controls or affects "about half" of the claims filed before the Indian Claims Commission. (Memorandum for the United States in response to petition for certiorari, pp. 9-10.) We believe that representation to be without valid support.

Two sections of the Indian Claims Act deal with original jurisdiction over tribal claims. Section 2 defines the jurisdiction of the Indian Claims Commission and section 24 (now 28 U. S. C. 1505) defines the jurisdiction of the Court of Claims under which the *Tee-Hit-Ton* case arises. However, the two jurisdictions are not coextensive. In the Court of Claims the tribal litigant is confined to claims arising

<sup>2</sup> "The Indian title has been extinguished to all the public domain, except Alaska \* \* \*." Report, Commissioner of Indian Affairs, 1890, p. xxx.

after August 13, 1946.<sup>3</sup> As to those claims the tribe stands on the same footing as any non-tribal suitor. On the other hand the Indian Claims Commission's jurisdiction is retroactive to claims arising on and before August 13, 1946 (sections 2 and 12 of the Indian Claims Act). Before the Commission (under section 2, clauses (1) and (2)) the tribal claimant has rights equivalent to those it has in the Court of Claims in post-August 13, 1946 claims and in addition, has much broader rights under section 2, clauses (3), (4) and (5) of the Indian Claims Act. Clauses (3), (4) and (5) are stated in "unusually broad language"<sup>4</sup> to carry out the Congressional intent that there be put at rest all possible and conceivable tribal claims, legal, equitable and moral.<sup>5</sup>

<sup>3</sup> Prior to section 24 of the Indian Claims Act, the Court of Claims under its general jurisdiction could not take cognizance of any claim against the United States "growing out of or dependent upon any treaty stipulation entered into with foreign nations or with the Indian tribes." Act of March 3, 1863, c. 92, sec. 9, 12 Stat. 767, contained in R. S. 1066 and made part of the Judicial Code by the Act of March 3, 1911, c. 231, sec. 153, 36 Stat. 1138 (28 U. S. C. 259). To put "the Indian on the same basis, as far as his record in the Court of Claims goes, as any white man", this limitation was wiped out by section 24 of the Indian Claims Act. Hearings, House Committee on Indian Affairs, H. R. 1198, H. R. 1344, 79th Cong., 1st sess., June 11, 1945, p. 139. H. Rept. No. 1466, 79th Cong., 1st sess., (1945), p. 13. Under Section 24, Indian tribes were given the same right as other litigants to maintain suit under the general jurisdiction of the Court of Claims (28 U. S. C. 259, now 28 U. S. C. 1491). When the United States Code was revised, section 24 of the Indian Claims Act was incorporated into title 28, and now appears as 28 U. S. C. 1595.

<sup>4</sup> Mr. Justice Black's reference to the Indian Claims Act in *United States v. Alcea Band*, 329 U. S. 40, 55.

<sup>5</sup> Broad and comprehensive language was deliberately chosen to carry out the objectives of the Act—namely to free Congress from the insistent demands of the tribes for special jurisdictional acts and to bring all tribal claims to a final determination. This is reflected throughout the legislative history and there is nothing to the contrary, e. g. H. Rept. No. 1466, 79th Cong., 1st sess., (1945), p. 2: " \* \* \* giving them a full and untrammeled right to have their grievances heard \* \* \*"; *Idem*, p. 3: "Purpose of the Bill \* \* \* It would require all pending Indian claims of whatever nature, contractual and noncontractual, legal and nonlegal, to be submitted \* \* \*"; *Idem*, p. 49: "Jurisdiction. In order that the decisions reached under the

The Court of Claims has no jurisdictional counterpart to clauses (3), (4) and (5). The case below was decided under the general jurisdiction of the Court of Claims, not under language in any way comparable to clauses (3), (4) or (5). Accordingly, affirmance of the decision below would not stand for the proposition that original Indian title is not compensable under the Indian Claims Act (clauses (3), (4) and (5)). Of course, reversal of the decision below on the ground that original Indian title is compensable under the Fifth Amendment, would leave the Government without any excuse for asserting that Indian title is not compensable under the Indian Claims Act.

A. *This Court by implication has recognized that claims based on original Indian title are compensable under the Indian Claims Act.* In the first *Alcea* case (*United States v. Alcea Band*, 329 U. S. 40) a majority of this Court implicitly recognized that claims based on original Indian title were compensable under the Indian Claims Act. Mr. Chief Justice Vinson, joined by three associates stated (329 U. S. at p. 49): "[under the Indian Claims Act] not only are claims similar to those of the case at bar [original In-

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proposed legislation shall have finality it is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include *all possible claims*. If any class of claims is omitted, we may be sure that sooner or later that omission will lead to appeals for new special jurisdictional acts;" *Idem*, pp. 14-18 where the Attorney General and the Secretary of the Interior favored the disposition of "all" claims. (Emphasis supplied.) During the debates in the House (93 Cong. Rec. 5307-5316) the Chairman of the Rules Committee, the manager of the bill, the Chairman of the Committee on Indian Affairs and the committee leader of the minority party made clear that the bill was to "put an end to these tribal claims," 93 Cong. Rec. pp. 5307-8; to settle them "once and for all", p. 5308; "bring them to a conclusion once and for all" to give tribes "an opportunity to present all their claims of every kind, shape and variety", to include "all possible claims", p. 5312, to "give the Commission the broadest possible jurisdiction to consider every Indian grievance, real or fancied", p. 5316. See also the conference report, H. Rept. 2033, 75th Cong., 2nd sess. (1946).



dian title claim] to be heard, but 'claims based upon fair and honorable dealings \* \* \* may be submitted to the Commission \* \* \*'. Mr. Justice Black who concurred in the affirmance expressed this thought more strongly when he stated (329 U. S. at pp. 54-55) that the *Alcea* jurisdictional act "created an obligation on the part of the Government to pay these Indians for all lands to which their ancestors held an 'original Indian title'"; that this interpretation fitted "into the pattern of congressional legislation which has become progressively more generous in its treatment of Indians", the capstone of which was the Indian Claims Act. Mr. Justice Black was of the view that since the *Alcea* claim could be pursued under "this broad recent legislation [Indian Claims Act]" the *Alcea*'s special jurisdictional act should be given a "similarly broad interpretation".

The second *Alcea* case (341 U. S. 48) was limited to the question of "interest" which the Court of Claims had allowed (115 C. Cls. 463). The Government had asked not only for review of the "interest" question but also for review of the issues of liability and valuation. In its petition for certiorari it argued that Mr. Justice Reed's note in *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106n., so heavily relied upon in the court below (R. 19-20), expressed this Court's view that liability was created by the jurisdictional act and did not stem from the Fifth Amendment.<sup>6</sup> The Government contended that, if there was no taking under the Fifth Amendment and if the jurisdictional act did not create the liability, there was no liability for either principal or interest (Petition, Docket No. 281, Oct. Term, 1950, pp. 7-8).

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<sup>6</sup>After quoting the footnote from the *Hynes* case, the Government in its petition for certiorari in second *Alcea* stated (Petition, Docket No. 281, Oct. Term, 1950, p. 10): "The italicized phrase — 'specific legislative direction to make payment' — plainly treats the legislative direction as creating the liability rather than simply the removal of obstacles to suit."

This Court with full cognizance of Justice Reed's footnote in the *Hynes* case, denied the Government's petition so far as the questions of liability and valuation were concerned and limited the grant of certiorari to the question of "interest". (340 U. S. 873.)

In its brief on the merits the Government again quoted in full Justice Reed's footnote in the *Hynes* case and again argued that the footnote "has been taken by the Government as some indication that a majority of the Court might be of the view that unrecognized 'Indian title' is not constitutionally compensable \* \* \*" thus precluding interest.<sup>7</sup> In its per curiam opinion denying interest, this Court disregarded the argument and made no mention of the *Hynes* case. It treated the *Alcea* case as one where the recovery was not grounded on the Fifth Amendment.<sup>8</sup> That being so, the question of whether original Indian title was compensable under the Fifth Amendment was neither considered nor decided. Interest was disallowed on the authority of cases holding "that interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract" (341 U. S. 48, 49). No further reason was given for the allowance of the principal sum of the award, since that question was not up for review. Most important, the Court did not accept the Government's invitation to convert the dictum in Justice Reed's footnote in the *Hynes* case into law. This supports the view that in the second *Alcea* case this Court by implication rejected the argument founded on the *Hynes* footnote. We say by implication since this Court affirmatively cited the line of cases holding

<sup>7</sup> Docket No. 281, Oct. Term 1950, Brief for the United States, p. 18. See also pp. 17-19.

<sup>8</sup> "Looking to the former opinions in this case, we find that none of them expressed the view that recovery was grounded on a taking under Fifth Amendment" (341 U. S. at p. 40).

interest not allowable unless expressly authorized but said nothing about lack of compensability of Indian title.

It seems to us that the two *Alcea* decisions together hold that, under the special jurisdictional act, the *Alcea* band could recover compensation for the appropriation of land held by original Indian title but could not recover interest. This leaves open to inference the basis of this Court's action in allowing principal and denying interest. The authorities cited by the Court in second *Alcea* support only the view that it was the jurisdictional act which permitted payment of compensation without interest in the *Alcea* case. If that is so, then we say that clauses (3), (4) and (5) of section 2 of the Indian Claims Act do the same. Those clauses are fully as comprehensive as the *Alcea* jurisdictional act. If the latter authorizes payment, so do clauses (3), (4) and (5). The Government itself so construed clause 4 in its petition for certiorari in the second *Alcea* case, when, after quoting section 2 of the Indian Claims Act in full, it stated to the Court (Petition, Docket No. 281, Oct. Term, 1950 p. 9, n. 5): "*Clause (4) seems not to differ in substance from the special act involved in this [Alcea] case.*"

B. *The Court of Claims in its appellate capacity has confirmed that claims based on Indian title are compensable under the Indian Claims Act.* Under its appellate jurisdiction (25 U. S. C. 708) the court below has reviewed decisions of the Indian Claims Commission on claims based on "Indian title" arising under clauses (3), (4) and (5). In every instance the court below has treated such claims as compensable.<sup>9</sup> The decision below in no sense was intended to mark a departure from the consistent view that claims founded on original Indian title are compensable under the Indian Claims Act.

<sup>9</sup> In its answers to claims before the Commission which in any form involve original Indian title the Government has included the stock defense

*II. Reversal of the decision below will not result in huge recoveries of principal and interest such as implied by the Government.*

The Government has elected to use this case before this Court as the vehicle for establishing that original Indian title is not compensable either under the Fifth Amendment or under the Indian Claims Act. In its memorandum in

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that original Indian title is not compensable and the claim should be dismissed. The Indian Claims Commission has consistently rejected this defense and dealt with the claims on the merits. On appeal the Government has unsuccessfully advanced the same defense in support of the Commission's dismissal on the merits. *Snake or Plate Indians v. United States*, 125 C. Cls. 241, 244, n. 1 (1953) setting aside the Commission's dismissal and remanding for proper findings a claim based on the taking without any compensation of land held by original Indian title. In *Pawnee Tribe v. United States*, 124 C. Cls. 324, 327-328 (1953), involving three "unconscionable consideration" claims, that is, claims for the difference between the treaty consideration and the value at the time of the treaty ceding land held by original Indian title, the court below refused to adopt the Government's view and dispose of the appeals on the ground Indian title was not compensable but instead remanded the case for further proceedings on the merits. *Quapaw Tribe v. United States*, — C. Cls. —, slip opinion pp. 2-4 (Appeal 1-52 decided April 6, 1954) where the court below affirmed the Commission's dismissal on the merits of an "unconscionable consideration" claim. See also *Assiniboine Indian Tribe v. United States*, — C. Cls. —, slip opinion p. 12 (Appeal No. 1-53, decided June 8, 1954) where the court stated:

\* \* \* As to the latter class of claims [meaning those under clauses (2), (3), (4) and (5)] which marked the real departure by Congress from the normal situation previously existing in Indian litigation, there was clearly a real departure from prior practice and procedure, and it is perfectly clear from the provisions of the act and its history that this was intended for the purpose of closing out tribal claims for ancient wrongs, real or supposed.

After the decision below, the Government urged the Court of Claims, on authority of its *Tee-Hit-Tow* holding, to reverse the determination of the Commission in an "unconscionable consideration" case granting an award without interest representing the difference between the treaty consideration and the market value of land held by original Indian title which was ceded by the treaty. The Government is contending that the Indian Claims Act permits recovery only in claims founded on "recognized title" and not on original Indian title. *Otoe and Missouri Tribes v. United States*, Appeal 1-54, C. Cls. Brief of United States, appellee and cross appellant, pp. 30-33, filed April, 30, 1954.

response to the petition for certiorari the Government refers to the "impact" of the question here presented to about 400 claims filed before the Indian Claims Commission asserting those claims "involve in some form or other the question of compensability of original Indian title."<sup>19</sup> The inference is that huge sums of principal plus "interest" as a measure of just compensation, will be allowed under the Indian Claims Act if this Court here holds that the Constitution protects the original property of Indian Tribes. We should like to give the *quictus* to this pseudo-pragmatical approach.

In the first place, assuming *arguendo* that the Fifth Amendment covers claims under the Indians Claims Act

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<sup>19</sup> Memorandum of the United States in response to the petition for certiorari, pp. 9-10, n. 8. For a detailed list of the cases pending before the Commission the respondent referred the Court to the appendix to the Government's brief in *United States v. Alcea Band of Tillamooks*, No. 281, October Term, 1950. As pointed out by the Government that list was compiled as of January 10, 1951, prior to the expiration of the cut-off date for filing claims. That list was an "estimate of amount claimed" based solely on the allegations of acreage, value and interest contained in each petition. The Act was then new and perhaps it was not possible to sift out those claims which would be affected by a holding that original Indian title is compensable under the Fifth Amendment. Similarly, since all claims had not been filed, the Government could not know the extent of overlapping claims for the same land. But that was not true when the Government filed its memorandum in this case. The Government has the defense of all these claims and should be in a position to furnish the Court with a table showing the claims which would be affected by this case. Apparently it has elected to rest on its approximation that about 400 claims "involve in some form or other the question of the compensability of 'original Indian title'." (Government's memorandum on certiorari, p. 10.) The Government's estimate does not take into account the overlapping claims, of which it is aware since it has filed numerous motions to consolidate claims for the same land. Moreover, the estimate is not limited to claims for the appropriation of land held by original Indian title where there was no ratified treaty of cession. As we see it, the latter class are the only ones which should be included in the count, and even those claims would be affected only if this Court should hold that they were compensable under the Fifth Amendment, rather than section 2, clause (4) of the Indian Claims Act. Appendix, pp. 15-17, shows there are only 72 such claims.

for the appropriation of land held by original Indian title,<sup>11</sup> there are at most 72 such claims, not 400, as asserted by the Government. In the second place, as to those 72 claims, the pertinent thing is the probable recovery, not the exaggerated amounts traditionally claimed in petitions. In the third place, even if there is liability under the Fifth Amendment there is no compulsion on the Indian Claims Commission to measure just compensation in terms of interest.

First, assuming *arguendo* it is finally held that the Fifth Amendment embraces Indian Claims Commission claims for

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<sup>11</sup> The question of whether the Fifth Amendment includes such claims should be determined in a case arising under the Indian Claims Act and not under the general jurisdiction of the Court of Claims. The Indian Claims Commission has held that section 2, clauses (3) and (5) do not provide for interest. *Otoe and Missouri Tribe v. United States*, 2 Ind. Cls. Comm. 335, 373. Neither does section 2, clause (4) contain such a provision and the Court's attention is directed to the legislative history of the Indian Claims Act which may indicate that section 2, clause (4) and not section 2, clause (1) of the Indian Claims Act was intended to include claims for the appropriation of land held by original title.

The language now incorporated in clause (4) was first suggested to the House Committee on Indian Affairs by the Assistant Solicitor of the Department of Interior Felix S. Cohen to "give express recognition to one of the most clearly just and grievously resented classes of claims, that growing out of the scattered instances where lands peaceably held under an uncontested Indian title have been expropriated without an act of cession on the part of the Indians, or where the Government has retained ceded lands notwithstanding its failure to ratify or carry out the terms of the cession". Hearings, H. R. 1198 and 1341, 79th Cong., 1st sess., p. 141. In the Senate the clause was stricken for purposes of clarification but not "to deprive claimants of the right to invoke the jurisdiction of the Commission in any case which would have been cognizable under the language of the bill as it passed the House." (S. Rept. 1715, 79th Cong. 2d sess., (1946), p. 5.) After the bill went to conference what is now clause (4) was restored. The House Conference report recited (H. Rept. 2693, 79th Cong. 2nd sess., (1946) p. 5): " \* \* \* The second of these classifications (clause 4) covers claims arising from the taking by the United States of Indian lands, i. e., lands to which tribal claimants had 'Indian title' or the 'right of occupancy.' Sometimes these lands were taken under the guise of stipulated treaties, sometimes without any semblance of a treaty. The recognition of this classification makes it plain that where claimant can prove sufficient facts within the language of this classification the Commission has full authority to award proper damages therefor."

the taking of original Indian title, the only claims before the Commission which would be affected by such a decision would be those under section 2, clause (4), where the land held by original title was taken by the United States without a treaty of cession (e. g. situations such as the one presented in the *Alcea* case.)<sup>12</sup> There are only 72 claims falling in that class and of these 51 cover all or a portion of the same land and therefore duplicate each other.<sup>13</sup> See Appendix, pp. 15-17. Final judgment has not been rendered on any of these claims.

Second, an honest estimate of the potential recoveries

<sup>12</sup> It would not affect claims for the taking of tribal land held by "recognized" title (section 2, clause (1)) since under the law such claims are clearly compensable under the Fifth Amendment. *United States v. Klamath Indians*, 304 U. S. 119; *Chippewa Indians v. United States*, 301 U. S. 358, 375; *Shoshone Tribe v. United States*, 299 U. S. 476; *United States v. Creek Nation*, 295 U. S. 193. It would not affect possible claims based on "tortious" takings (section 2, clause 2) never subsequently ratified by the United States and never converted into lawful takings. We are not aware of any such claims before the Indian Claims Commission but if such there be the claimant would not be entitled to an increment above the principal sum under the doctrine of *United States v. Goltz*, 312 U. S. 203, 209-210. It would not affect claims based on revision of treaties, contracts or agreements, (section 2, clause 3)—e. g. where land held by Indian title is ceded to the United States for an unconscionable consideration. Recovery in such instances is limited to the difference between the treaty consideration and the value of the land at the time of the cession without interest. Since these claims are founded on the treaty or other contract no interest may be recovered. The Commission has allowed recovery in such a case in only one case and there it specifically denied interest on the ground that the Indian Claims Act "does not provide for the allowance of interest on awards made under clauses (3) or (5) \* \* \*". *Ojibwa and Missouri Tribe v. United States*, 2 Ind. Cls. Comm. 335, 373 (1953). It would not affect claims based on "fair and honorable dealings" (section 2, clause 5) since such claims are moral in nature and there is no basis for allowing "interest", *Ojibwa and Missouri Tribe v. United States*, *id. supra*. At most it would affect the claims under section 2, clause 4 discussed in the text.

<sup>13</sup> There may be overlaps on the 51 claims in addition to those shown. Also, it is possible that some of the remaining 21 claims are overlapped, since the search on which the Appendix was constructed was necessarily limited by time. It might be pointed out that of the 21 claims shown without overlaps, eight (signalled with an \*) are in Alaska and six are Pueblo claims for relatively small acreage.



should not be based on the prayers in the petition.<sup>14</sup> As of December 1, 1953, the Commission had disposed of 48 cases where there had been no reversal. None included claims based on takings of land held by aboriginal Indian title where there was no ratified treaty. The total of the awards in the 48 cases was \$7,399,815 while the total claimed without interest was \$544,403,697 and this latter figure includes only those of the 48 cases where the petition specified the amount claimed. This ratio of 7 to 544 is the best available indicator of the spread between recoveries and amounts claimed. The awards of \$7,399,815 were made in eight cases. In those eight the total claimed was \$110,568,895 so that even in the successful cases the ratio of awards to amounts claimed was 7 to 110.<sup>15</sup>

Third, assuming cases falling under section 2, clause 4, are entitled to just compensation under the Fifth Amendment there is nothing in the law which compels the allowance of interest as such. This Court has made it plain that the "increment [may] be measured either by interest on the value or such other standard as may be suitable in the light of all circumstances." *Shoshone Tribe v. United*

<sup>14</sup> This is pointed up by the following colloquy between the Chief Commissioner of the Indian Claims Commission and a member of the House subcommittee on appropriations during the Hearings on the appropriation for the Commission, Hearings, Independent Offices Appropriations, 1955, 83d Cong., 2d sess., (January 4, 1954) Part 1, pp. 96-97:

Chief Commissioner: I might liken to Texas experiences and that is that all cows that were killed by the railroads in the old days were always Jerseys.

Mr. Thomas: And they were registered too and they always had a high pedigree.

Mr. Witt: Yes, sir, that is right. When they claim for this acreage, there is no limit to what they might claim, but when we have a claim for \$2 or \$3 an acre and more—as of 1865—the award usually is from 50 cents to a dollar figure. They usually claim interest also, but we have never found any liability as yet for interest.

<sup>15</sup> All figures are taken from statistics furnished by the Indian Claims Commission to the House subcommittee on appropriations as set out in the hearing before that committee, 83d Cong., 2d sess. (January 4, 1954) Part 1, pp. 96-98, particularly pages 95-97.

*States*, 299 U. S. 476, 496 (emphasis supplied). The Indian Claims Commission may well consider the age of the claims, the present population of the tribe, the entire course of dealings between the United States and the tribe, the favors, and grants and gratuities made by the United States to the tribe and in its discretion allow a sum which in all the circumstances would be a just increment both to the tribe and to the United States. The sum might be nothing, or one-half, or twice, or any other fraction or multiple of the principal. The judicial discretion would have wide latitude. As matters now stand, it is the impression, probably stemming from decisions in contemporaneous takings, that interest alone is the only measure of just compensation. It may be the best available measure in current claims controlled by the statute of limitations, but it is not necessarily applicable to claims going back 100 years or more where interest at 4 or 5 percent would multiply the principal four or five times. Courts need not operate as mere computing machines in measuring just compensation.

### Conclusion

The claim of the Tee-Hit-Ton Indians should be dealt with as if the claimant were a non-Indian invoking the jurisdiction of the Court of Claims. It should not be treated as a test of the compensability of claims before the Indian Claims Commission under the Indian Claims Act.

Respectfully submitted,

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## APPENDIX

### TABLE OF CLAIMS CURRENTLY PENDING BEFORE INDIAN CLAIMS COMMISSION FOR TAKING OF LAND HELD BY ORIGINAL INDIAN TITLE WHERE THERE IS NO RATIFIED TREATY OF CESSION

Same land duplicated in other claims

Docket No.	Tribe	In Part	Completely
10	Pawnee, Claim 1	Kaw § 33	Docket 10, Claim 2
17	Snake or Piute Indians	Klamath § 100; N. Paiute § 87	
22	Apache Nation, ex rel. etc.	Navajo § 229; Hualapai § 90	Apache § 30; Havasupai § 91
30	Fort Sill Apaches	Navajo § 229; Hualapai § 90	Apache § 22; Havasupai § 91
31	Indians of California		Indians of California § 37
37	Indians of California		Indians of Cal. § 31
44	Uintah Ute Indians	S. Paiute § 88, § 330	
46	Nooksack Tribe of Indians	See § 98	
48	Chiricahua and Warm Springs Tribes of Apaches	Navajo § 229	Apache § 22, § 30
80	Mission Indians of California		Indians of Cal. § 31, § 37
87	Northern Paiute Nation	Indians of Cal. § 31, § 37	
88	Southern Paiute Nation	Indians of Cal. § 31, § 37	
90	Hualapai Tribe of Indians	Apache § 22, § 30	
91	Havasupai Tribe of Indians	Navajo § 229	Apache § 22, § 30
94	Lower Pend d'Oreille or Kalispel		
98	Muckleshoot Tribe of Indians		Possible with § 46, § 240, 261, 262, 263, 293, 294
137	Pueblo De Zia, Jemez and Santa Ana	Navajo § 229	
148	Cabazon Band of Mission Indians		Cal. Indians § 31, § 37
149	Twenty-nine Palms Band of Mission Indians		Cal. Indians § 31, § 37
170	Pascagoula, Biloxi and Movilian Bands of Indians		
171*	Tee-bit-ton Indians		
174	Pueblo De Pecos		
176	Yokiah Tribe of Indians		California § 31, § 37

## APPENDIX—Continued

Docket No.	Tribe	Same land duplicated in other claims	
		In Part	Completely
181	Confederated Tribes of the Colville Reservation		
182	Fort Sill Apache		Apache #22, #30
187*	John Billum for himself and natives of Chitina, Alaska		
196	Hopi	Hopi #210; Navajo #229	
210	Hopi Village of Shungopovi	Hopi #196; Navajo #229	
211	Pueblo De Isleta		
214	San Juan Tribe of Indians	(Possibly with same cases listed re #98)	
215	Yana Tribe of Indians		California #31, #37
218	Cowlitz Tribe of Indians	(Possibly with #234, #237)	
221	Chippewa Cree		
222	Confederated Tribes of the Colville Reservation	Nez Perce #180	
227	Pueblo of Laguna	Navajo #227	
228	Gila River Pima-Maricopa Indian Community		
234	Chinook	(See #218)	
237	Upper Chehalis, et al.	(See #218)	
240	Confederated Tribes of Siletz Indians	(See #98)	
261	Samish	(See #98)	
262	Tulalip Tribes, Inc.	(See #98)	
263	Kikiallus Tribe of Indians	(See #98)	
264	Confederated Tribes of the Umatilla Reservation	N. Paiute #87	
265	Coos (or Kowes) Bay, et al.		
266	Acoma Pueblo	Navajo #229	
278*	Tlingit and Haida Indians of Alaska		
283	Colorado River Indians	California #31, #37; Mohave #295; Chemehuevi #351	

285*	Native Village of Unalakleet	
286*	Native Village of Shungnak	
287*	Nisgah Tribe, ex rel.	
288	Washoe Tribe of the States of Nevada and California	California #31, #37
293	Swinomish Tribal Community	(See #98)
294	Skagit Tribe of Indians	Skagit #92; see #98
R. 295	Mohave Tribe of Arizona	California #31, #37; Colorado R. #283; Chemehuevi #351
320	Quechan Tribe of the Fort Yuma Reservation	California #31, #37
325	Morongo Band of Mission Indians	California #31, #37
326	Shoshone Tribe of Indians	N. Paiute #87
330	Southern Paiute Nation	California #31, 37
332	Yankton Sioux	All Sioux cases
333	Stanley W. Miller, Shasta Tribe of California	California #31, #37
344 (2)	Six Nations	Ab. Delaware #202
345	Papago Tribe of Arizona	Apache #22, #30
347	Pitt River Indians of Cal.	California #31, #37
350	Three Affiliate Tribes of Fort Berthold Reservation	Turtle Mountain #113
R. 351	Chemehuevi Tribe of Indians	California #31, #37; Colorado R. #283; Mohave #295
354	Pueblo of San Ildefonso, et al.	
355	Pueblo of Santo Domingo	
356	Pueblo of Santa Clara	
357	Pueblo of Taos	
358	Pueblo of Nambe	
369*	Aleut	
370*	Natives of Palmer, Alaska	

Total without overlaps	21
Total overlapped in part or in whole	51
Grand total	72

\* Claim for land in Alaska.

Service of the foregoing brief acknowledged on behalf of the United States this — day of October, 1954.

— —.

Service of the foregoing brief acknowledged this — day of October, 1954.

— —,  
*Attorney for Petitioner.*

(7747)

Office - Supreme Court, U. S.  
FILED

OCT 8 1954

HAROLD B. WILLEY, Clerk

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1954**

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**No. 43**

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**THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE GROUP OF  
ALASKA INDIANS,**

*Petitioner*

*vs.*

**THE UNITED STATES**

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**ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS**

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**BRIEF OF THE STATE OF UTAH, AMICUS CURIAE**

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**E. R. CALLISTER,**  
*Attorney General,*  
*State of Utah.*



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SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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**BRIEF OF THE STATE OF UTAH, AMICUS CURIAE**

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**Interest of the Amicus Curiae**

The State of Utah has recently been faced with problems concerning the emancipation from federal jurisdiction and control of the Indians within the jurisdiction of the State, starting with permission accorded this State by the Act of August 15, 1953, Public Law 280, 83d Cong., Section 7 of which gives consent of the United States to the assumption by the State of jurisdiction respecting civil and criminal matters. The most recent matter affecting the State is the

Act of August 27, 1954, Public Law 671, 83d Cong., providing for termination of federal supervision over the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah.

Problems of termination of federal supervision and control are compounded by problems of assets and their availability. For Indians within this State usually remain distinct from the non-Indian community; many do not speak English; and all but the Utes (who obtained a substantial recovery for their claims against the United States for the taking in 1938, under the power of eminent domain, of their interest in Colorado lands) are poor—sometimes miserably poor. Without resources in their own capital with which to plan and effect loan and development programs (as was done with the Utes when they became financially able), a substantial proportion of our Indians have scant chance of orienting themselves within the white culture.

Although living a precarious, hand-to-mouth existence in many cases, none of these Indians are beggars. On the contrary, one thing which holds them together in a tight group are the claims which the respective tribes have against the United States for its deprivation of the tribal lands—the destruction of their Indian title.<sup>1</sup> From the aged, who were personally amongst the dispossessed, to the youngest generation, they have sought and are seeking restitution by the United States for its seizure and disposition of their domain and means of livelihood. When that restitution is made on an honorable and fair basis, the

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<sup>1</sup> Those Utah Indians having claims involving original Indian title are certain bands of Shoshones and Goshutes, portions of the Southern Paiute, and the original Utah Ute (the Uintah Band, as distinguished from certain Colorado Utes who were removed to Utah in 1881 and now reside within this State). All have claims for the taking of Indian title pending in the Indian Claims Commission.

State believes it can then, as is happening with the Utes, take over a group of self-respecting and self-reliant people generally eager to fit themselves into our western culture.

The State of Utah is vitally concerned that the federal government not abdicate both its duty to see to the settlement of these old claims and its duty to clean up a situation which it has permitted to develop during a century of holding the Indian problem within its own, exclusive jurisdiction. An important part of cleaning up that problem consists of settling for the taking of Indian title on a fair and just basis. To the extent that the court below holds that the purpose of Congress to make compensation for the taking of Indian title may not be given effect, this State is interested in overcoming the opinion so the problems of the State with its Indian population may sooner and more forthrightly be disposed of.

### Statement

Petitioners, an identifiable group of American Indians, brought an action in the Court of Claims for a taking by defendant of an interest in their lands owned under original Indian title, the date of taking being after August 13, 1946. Accordingly, the action was founded on Section 1505 of the Judicial Code (Section 24, Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1055). That jurisdiction provision permits the tribe or group to sue in the Court of Claims on a claim "arising under Constitution, laws, treaties of the United States, or Executive orders of the President," or upon a claim which otherwise would be cognizable if the claimant were not Indian. While holding (R. 16) that petitioner is an identifiable group of American Indians, the court held that a dictum in a footnote in *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106, was a statement which must be taken as law, and meant that an origi-

nal Indian title was not compensable if seized or taken by the United States "unless Congress had recognized the tribe's interest as a legal interest." R. 19-20.

Accordingly, the court below entered judgment (R. 33) against petitioner and in favor of the United States.

### Question Presented

Is the taking by the United States of lands owned by an Indian tribe, band, or group under original Indian title the taking of a compensable interest in lands for which the United States is liable?

### Argument

*What is Indian title?*—"Indian title" (the words seem to have been advanced by this Court as a short way of expressing a somewhat involved concept) has been defined by this Court as the right of a tribe to the use and occupancy of the soil to the exclusion of any other persons or the United States, but with a co-existing "ultimate fee" in the United States. The "ultimate fee" referred to is the ultimate, exclusive right of the United States to assume ownership of lands theretofore under the Indian title when that use and occupancy shall be terminated, together with the exclusive right to extinguish that Indian title. *Johnson v. McIntosh*, 8 Wheat. 543, 574, 588-596, 603; *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 48; *Worcester v. Georgia*, 6 Pet. 515, 544-547, 552, 559; *Mitchel v. United States*, 9 Pet. 711, 745-746; *Holden v. Joy*, 17 Wall. 211, 243-244; *Leavenworth & Co. v. United States*, 92 U. S. 733, 742-743; *Beecher v. Wetherby*, 95 U. S. 517, 525-526; *United States as Guardian of the Hualpai Indians v. Santa Fe Pac. R. Co.*, 314 U. S. 339, 345, and cases cited.

*Distinction with respect to "recognized" title of Indians.*—At one time or another the United States has formally acknowledged the right and title of particular Indian tribes



to lands comprising the overwhelming part of the United States.<sup>2</sup> Many times it has purchased that title, or has agreed that so much of the lands as it did not purchase could continue in the peaceable possession of the particular tribes.<sup>3</sup> But there are still areas—and some of them in the State of Utah—wherein Indians to this day hold their lands by virtue of their Indian title, without any guaranty from the United States specific as to the particular tribe or particular land.<sup>4</sup> To the tribe whose land is seized and disposed of to others, it makes little difference whether the government had formally and specifically guaranteed the tribe's continued possession of the land or whether that possession was under merely the general policy respecting the Indian title. In either instance, the United States—which had the exclusive right to do so—took the land. If it

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<sup>2</sup> At the time he approved the Indian Claims Commission Act, President Truman issued a statement in the course of which he said that "Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 per cent of our public domain, paying them approximately 800 million dollars in the process." White House Press Release, August 13, 1946.

<sup>3</sup> The five volumes of Kappler, *Indian Laws and Treaties*, are replete with the detail of these "recognitions."

<sup>4</sup> Of course, general statutes, and the plain policy of the United States throughout its history, have recognized and guaranteed the sanctity of the Indian ownership. Those statutes are reviewed by this Court in *United States as Guardian of Hualpai Inds. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347-348. This was part of the policy this country took along with the title-by-discovery of the European nations upon which the "ultimate fee" of the United States is based. From the time of the earliest discoveries by Europeans until and following the founding of the United States, the Indians "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion." *Johnson v. McIntosh*, 8 Wheat. 543, 574. ". . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Minnesota v. Hitchcock*, 185 U.S. 373, 388-9.

did not also make compensation, then as a result there arose a claim, a claim which the tribe felt ought to be worth just as much to the tribe as the seized lands.

But under the boilerplate language of the traditional jurisdictional act coming before the courts, there was a great distinction in favor of a "recognized" (*i. e.*, guaranteed) title. For the traditional acts authorized suit against the United States by the tribes only on claims "arising under or growing out of" the Constitution, treaties, agreements and statutes. If the Indian title had been "recognized" by treaty with the tribe, then the claim arose under or grew out of the treaty; and the tribe recovered.<sup>5</sup> But even though the tribe owned the Indian title, if that title were not also guaranteed by treaty or agreement then the claim did not "arise under or grow out" of a treaty or agreement, and the tribe lost.<sup>6</sup> Thereby, the Indians were sent back to Congress for a broader grant of jurisdiction. Even prior to the Indian Claims Commission Act (Act of August 13, 1946, c. 959, 60 Stat. 1049, 25 U.S.C. § 70 *et seq.*) Congress had accorded jurisdiction to sue on the Indian title, and

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<sup>5</sup> United States *v.* Creek Nation, 295 U.S. 103, 108, 302 U.S. 620; Shoshone Tribe of Inds. *v.* United States, 299 U.S. 476 (rev'g 82 C. Cls. 23); 304 U.S. 111 (aff'g 85 C. Cls. 331);

United States *v.* Klamath & Moadoc Tribes, 304 U.S. 119;

United States *v.* Mille Lac Chippewas, 229 U.S. 498, 509-510;

New York Inds. *v.* United States, 170 U.S. 1; 173 U.S. 464;

Choctaw Nation *v.* United States, 119 U.S. 1, 41;

Cf. United States *v.* Choctaw &c. Nations, 179 U.S. 494;

Cf. United States *v.* Omaha Tribe, 253 U.S. 275, 281-2;

Cf. Yankton Sioux Tribe *v.* United States, 272 U.S. 351.

<sup>6</sup> Northwestern Bands of Shoshone Inds. *v.* United States, 324 U.S. 335, 337-339, 354.

Duwamish Inds. *v.* United States, 79 C. Cls. 530, 600, cert. den. 295 U.S. 755.

Cf. Western Cherokee Inds. *v.* United States, 27 C. Cls. 1, 35 (modified in other respects, 148 U.S. 427).

several cases were presented to and adjudicated by the courts on the basis of that jurisdiction.<sup>7</sup>

True, two members of this Court (324 U. S. at p. 355) at one time lectured Congress on these grants of jurisdiction, saying that "The Indian problem is essentially a sociological problem, not a legal one." As to at least one of those two, the plain policy adopted by Congress to the contrary in the Indian Claims Commission Act was thereafter deferred to (Mr. Justice Black, concurring, in *United States v. Alcea Band of Tillamooks*, 329 U. S. at p. 54-55). It is by now plain that sociological aspects of the problem have been eliminated by Congress from consideration by the courts. Instead, in the Indian Claims Commission Act Congress recurred to the traditional, legal aspect of the land claims of the Indian tribes.

*Political Nature of the Tribe as Affecting its Rights in Land, and "Compensability" of Indian title.*—The tribe, itself the owner of the land under the Indian cultures of this country, is also a *political* entity. We have entered into treaties with Indian tribes; we have conducted wars with them; we have made laws designed to strengthen the peace with them through regulating their existence and the relationships of non-Indians with them; we have conceded them a measure of political autonomy, so that many or most of the tribes to this day make their own laws, binding on their own members and on their own land, and enforced through their own courts.

As a corollary—often a disastrous corollary for the particular tribe—the courts have deemed relations between the

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<sup>7</sup> *Coos Bay Ind. Tribe v. United States*, 87 C. Cls. 143, cert. den. 306 U.S. 653;

*The Wichita Inds. v. United States*, 89 C. Cls. 378, 416;

*The Indians of California v. United States*, 98 C. Cls. 583;

*Alcea Band of Tillamooks v. United States*, 329 U.S. 40, aff'g 103 C. Cls. 494, 59 F. Supp. 934; same case, 341 U.S. 48, rev'g 115 C. Cls. 463, 87 F. Supp. 938.

federal government and the tribes beyond their consideration. "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565-566. Accordingly, and because of the political nature of their existence, the tribes cannot interfere with a taking of tribal property. *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 306-7. *The Cherokee Tobacco*, 11 Wall. 616, 620-621. Cf. *Beecher v. Wetherby*, 95 U. S. 517, 525; *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 66-68; *Thomas v. Gay*, 169 U. S. 264, 271; *Stephens v. Cherokee Nation*, 174 U. S. 445, 583; *United States as Guardian of Hualpai Inds. v. Santa Fe Pac. R. Co.*, 314 U. S. 339, 347.

This helplessness existed only with respect to takings of their land sanctioned by the federal government; for if anyone else tried to take the Indian title from the tribe, the courts were readily available for the protection of the tribal domain—either at the tribe's own suit (*Lane v. Pueblo of Santa Rosa*, 249 U. S. 110, 113) or at the suit of the United States on behalf of the tribe (*United States as Gdn. Hualpai Inds. v. Santa Fe Pac. R. Co.*, 314 U. S. 339, 347).

Important to the question in this case is the fact that it is not some defect in the legal quality or estate of the Indian tribe which defeats a suit for injunction or for damages for the taking of tribal lands by or through the United States. Even with an unrecognized Indian title, the title of the tribe has been described as a legal title, not merely a moral one.<sup>8</sup> Their *right* of occupancy is no less a right without a treaty than with it; even without the treaty guaranty, as

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<sup>8</sup> *Johnson v. McIntosh*, 8 Wheat. 543, 574, noting that the Indians have been admitted to be "the rightful occupants of the soil, with a *legal* as well as just claim to retain possession of it . . ." (Italics added).

a matter of law (were that open to the courts) the right would be held sacred, not to be taken save with consent of the owners.<sup>9</sup>

Rather, what defeats the suit is the political nature of the party plaintiff. Because of the political aspect the taking of a recognized, guaranteed, solemn-treaty-promised reservation is no more "compensable" than the taking of any mere Indian title. This lack of "compensability," just as true of the recognized title as of the unrecognized, exists

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<sup>9</sup> *Minnesota v. Hitchcock*, 185 U.S. 373, 388-9, "Whether . . . a reservation . . . or unceded Indian country, . . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Cherokee Nation v. Georgia*, 5 Pet. 1: ". . . unquestioned right to the lands they occupy, until . . . extinguished by a voluntary cession to our government; . . ." (p. 17). "Indians have rights of occupancy . . . as sacred as the fee-simple, absolute title of the whites; . . ." (p. 48). *Worcester v. Georgia*, 6 Pet. 515, 557: ". . . a right to all the lands within [their territorial] boundaries, which is not only acknowledged, but guaranteed by the United States." (p. 557). *Mitchel v. United States*, 9 Pet. 711, 745-746: ". . . owning them by a perpetual right of possession in the tribe . . . [which, though fee was in the crown] could not be taken without their consent. . . . their right of occupancy is considered as sacred as the fee-simple of the whites." *Leavenworth Railroad v. United States*, 92 U.S. 733, 742: ". . . unquestionable right to the lands they occupy, until . . . extinguished by a voluntary cession . . . This perpetual right of occupancy, with the correlative obligation of the government to enforce it. . . ." *United States v. Cook*, 19 Wall. 591, 593: ". . . right of Indians to their occupancy is as sacred as that of the United States to the fee. . . ." *United States as Guardian, etc. v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345, and *Cramer v. United States*, 261 U.S. 219, 227: "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy . . ." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 48: "It was usual policy not to coerce the surrender of lands without consent and without compensation. . . . Something more than sovereign grace prompted the obvious regard given to original Indian title."

for precisely the same reason in either case—failure of Congress to remove the political mantel over its dealings with the tribal property through grant of jurisdiction to the courts. As we have shown, once jurisdiction is granted, the courts have been able and willing to entertain the action of the tribe in either situation<sup>10</sup> and, where title and taking are proved, award judgment in favor of the tribe. In no case whatever that we have found, once jurisdiction has been granted, has this or any other court denied recovery for the reason that, if proved, Indian title would be “non-compensable”—a ready answer for the last 13¼ centuries, if it were sound.

This whole matter of “compensability,” so stridently argued by respondent, springs from one relatively off-hand sentence in a footnote, 20 pages along in this Court’s opinion in *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 106, note 28. There no Indians were attempting to recover compensation from the United States for taking their lands. The only question bearing on the Indian title was whether the Secretary of the Interior had taken away from non-Indian fishermen a fisheries they had theretofore been using, and had placed it in the hands of the Indians with a good title. It was held that the statute, on which the Secretary relied, was inadequate to authorize his taking the fisheries away from the *whites*—not the Indians. 337 U. S. at pp. 102-106. It is manifest that this Court did not—as respondent has rationalized<sup>11</sup>—by way of this remote

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<sup>10</sup> “. . . it cannot be doubted that, given the consent of the United States to be sued, recovery may be had for an involuntary, uncompensated taking of ‘recognized’ title. We think the same rule applicable to a taking of original Indian title . . .” *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 52.

<sup>11</sup> It is amusing to note that respondent emphasizes (Brf., pp. 40-41) that the first *Alcea Band of Tillamooks* decision (329 U.S. 40) was determined by a vote of only five-to-three. At the same time respondent refrains from mentioning that the *Hynes* decision (337 U.S. 86) was determined by a vote of only five-to-four.

sentence in a footnote smuggle into our law a complete reversal of the law respecting claims of Indians against the United States.<sup>12</sup>

*Respondent's Argument.*—The overwhelming part of respondent's argument (pp. 12-67) is devoted to the proposition that the right of Indian title is a "mere" right, since it can be taken or disposed of by the United States and since the Indians are powerless to sue to prevent the taking or disposition or to recover for it until Congress so authorizes. It is urged, thus, that it is "merely usufructuary"—as if the right to use and enjoy were trifling. This is an effort at argument by epithet. It takes no account of the reason the United States might take and the Indians might not

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<sup>12</sup> It should be pointed out that when the *Alcea* case came before this Court the second time (341 U.S. 48), respondent tried vainly to persuade this Court to consider its argument that the intervening *Hynes* footnote signalled a reversal of its prior decisions. In its petition for certiorari, the government presented the following question:

"2. Whether this Court's previous affirmance of an interlocutory judgment of liability rendered by the Court of Claims should be reexamined where there was no decision by a majority of this Court as to the reason for liability, and, if so, whether the respondents are entitled to compensation." Pet. for Cert., No. 281, O.T. 1950, at pp. 2-3.

And in arguing this point to the Court, the government urged (*Id.*, at pp. 9-11):

"Although the position that the Indians' right to recover was based upon the statute was originally expressed only by Mr. Justice Black, the opinion of the Court in *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 106n, suggests that his position is now regarded by the Court itself as stating the Court's holding."

With the point thus raised promptly following decision in the *Hynes* case, this Court advertently refused to consider such a point—expressly limiting the grant of certiorari to other issues. 340 U.S. 873. We now have the anomaly of respondent arguing that this Court accepted the proposition which it refused to grant the writ to consider, and that it permitted the *Alcea* Band to be compensated for an interest it had held to be non-compensable.



sue—the political genesis of the relationship between the two governments. That we have covered.

What remains for us to say is something about the intensiveness of the use by the Indians as it affects the quantity or quality of their estate. The matter has already plainly been expressed by this Court, against these same arguments that since some members of our own culture might make a use of the land generally more acceptable to our own culture, the rights of the culture already existing on the land might be ignored without penalty or liability of any kind.

Said this court one-and-a-quarter centuries ago in *Worcester v. Georgia*, 6 Pet. 515, 553 (Marshall, C. J.):

“So with respect to the words ‘hunting grounds.’ Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved.

“To the United States, it could be a matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village, and an occasional corn field, interrupted, and gave some variety to the scene.

“These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.”

Skipping to modern times, when there were specifically presented to this Court the question of the liability of the United States for dispossessing the Indians, and the most urgent arguments of this respondent that the right of the Indians was “merely” possessory, or “merely” one of use and occupation, this Court, after careful deliberation, concluded that those rights are not less valuable than the fee

of the lands. *United States v. Shoshone Tribe*, 304 U. S. 111, 115-118; *United States v. Klamath & Moadoc Tribes*, 304 U. S. 119, 122-123. In the *Shoshone* case, this Court held (pp. 116-117):

" . . . For all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest. *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 742-743. *Beecher v. Wetherby*, 95 U. S. 517, 525. The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee. See *Holden v. Joy*, 17 Wall. 211, 244. *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 557."

And so if we concede the whole proposition made by respondent concerning the power of the United States to take, and the inability of the Indians to sue without an express grant of authority, we have conceded nothing which should support to any degree the decision below.

*Has Congress Removed the Political Inhibition to Suits for a Taking of Indian Title?*—As we have noted, various Indians have gone back to Congress when they found that the more ordinary language of jurisdictional acts was insufficiently broad to permit consideration of their claims for a taking of their non-treaty Indian title. These claims, in conjunction with others, have festered over the years, and have complicated and ensnared solution of the "Indian problem" in this country. After prolonged consideration<sup>13</sup>

<sup>13</sup> Commencing January, 1930, with the introduction of H. R. 7963, 71st Cong. See, also, S. 3444, 73d Cong. H. R. 8554, S. 1465, H. R. 6655, S. 2731, H. R. 7827, all 74th Cong. S. 1902, H. R. 5817, 75th Cong. S. 2164, S. 4206, S. 4234, S. 4349 (*cf.* S. 3083), all 75th Cong. S. 1111, H. R. 4339, 77th Cong. H. R. 4693, H. R. 5569, both 78th Congress. H. R. 1198, H. R. 1341, and finally H. R. 4497 (which ultimately became the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049), all 79th Cong.

Congress accepted the view that *all* tribes ought to be permitted to be heard on all of their claims; that unless the claims were finally, fully, and fairly considered, there could be no settlement of the "Indian problem" in the foreseeable future. Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 25 U. S. C. § 70 *et seq.* (and 28 U. S. C. § 1505, formerly § 24 of the Ind. Cls. Comm. Act, under which this particular action was commenced).

The plain intention to set at rest finally the tribal claims appears throughout the legislative history of the bill (H. R. 4497, 79th Cong.) which became the act. In introducing the bill as a committee bill <sup>14</sup> the House Committee on Indian Affairs itself reported <sup>15</sup> as to the scope of jurisdiction to be accorded:

*"Jurisdiction*

*"In order that the decisions reached under the proposed legislation shall have finality it is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include all possible claims. If any class of claims is omitted, we may be sure that sooner or later that omission will lead to appeals for new special jurisdictional acts. And if the class of cases omitted is one which the Congress has in the past declared to be worthy of a hearing, in one or more jurisdictional acts, it is probable that future Congresses will likewise grant a hearing to such claims, and the chief purpose of the present bill, to dispose of the Indian claims problem with finality, will have been defeated. . . ."* (Italics added).

And the Chairman of the House Committee (Mr. Jackson) noted in the debate on the bill, May 20, 1946 (92 Cong. Rec. 5314), "If you are ever going to settle this Indian question in the United States, you have to settle these claims." And

<sup>14</sup> H. Report No. 1466, 79th Cong., 1st Sess., p. 1.

<sup>15</sup> H. Report No. 1466, 79th Cong., p. 10.

see the remarks of the Chairman of the Rules Committee (Mr. Sabath, pp. 5307-5308), the Floor Manager (Mr. Halleck, p. 5308), the further remarks of the Chairman of the Committee on Indian Affairs (Mr. Jackson, p. 5312), and the senior minority member of the Committee on Indian Affairs (Mr. Mundt, pp. 5315-5316). Note, also, that the Senate Committee on Indian Affairs adopted the report of the House committee. S. Rep. 1715, 79th Cong., 1st Sess., pp. 2-3.

Specifically as to what became Section 2 of the Indian Claims Commission Act, the Conference Report explained that in the act as finally adopted, Section 2(4) <sup>16</sup> "covers claims arising from the taking by the United States of Indian lands, i. e., lands to which tribal claimants had 'Indian title' or the 'right of occupancy'." H. Report No. 2693, 79th Cong., 2d Sess., pp. 5-6. The report added (*id.*):

"The reinsertion of this classification makes it plain that where claimant can prove sufficient facts within the language of this classification the Commission has full authority to award proper damages therefor."

Finally, the Congressional mandate contained in Section 2(5) of the Act, that the Commission should hear and determine even "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity," points up the absurdity of respondent's present position that the most grievous class of claims which afflicts the relationships between the government and the Indians are to have no forum.

At least as to Section 2(4), and (5), there could be no

<sup>16</sup> "Sec. 2. The Commission shall hear and determine . . . (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; . . ."

the action in this case was commenced under the jurisdiction to the Court of Claims, not that to an Indian Claims Commission. Section 24, Indian Claims Commission Act (28 U. S. C. § 1505). The grant to the Court of Claims is twofold. In the first place, jurisdiction is granted over claims arising under the Constitution, laws, treaties, or Executive orders of the President. This is standard jurisdictional phraseology for an Indian claimant, and as we noted above, thus far the courts have held that it does not give jurisdiction to consider the taking of land title which has not been "recognized" or guaranteed by treaty or agreement or statute.

In the second place there is granted jurisdiction over claims "which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band, or person." As we have seen, the reason absent a jurisdictional grant that an Indian tribe cannot recover for the taking of its land, even of a "recognized," guaranteed title, is that what otherwise would be the liability of the United States is shrouded by the "political" aspect of the relation between tribe and government. This second provision grants jurisdiction just as if the claimant were not an Indian tribe, hence the inhibition arising from the political aspect of the problem is removed. The tribe then appears as a corporation which had owned an interest in land taken by the United States. It should recover

by the claimant without the payment for such lands of compensation agreed to by the claimant," which is accorded the Indian Claims Commission—as distinguished from the Court of Claims—by the different provisions of Section 2(4) of the Indian Claims Commission Act. Does this mean that a tribe whose Indian title to lands was taken prior to August 13, 1946, can recover (since in the Indian Claims Commission), but not the tribe whose title was taken thereafter (since under the more limited jurisdiction of the Court of Claims)?

We think not. In the first place, this suggests a flippant regard for Indian claims arising in the future which is almost an absurdity in the light of the legislative history of the Indian Claims Commission Act. Congress was not retiring one troupe of claims only to set the stage for another. It was taking the overdue step to clear up injustices of the past and making provision to keep them clear for the future.

Why, then, does the provision according jurisdiction to the Commission include not only this first and second aspect of jurisdiction given the Court of Claims, but in addition the fourth provision specifically providing for recovery for past takings of Indian title? The reason is plainly to be found in the legislative history of the Indian Claims Commission Act; the committee which introduced the first draft of the bill (H. R. 4497, 79th Cong.) which became the Indian Claims Commission Act reported (H. Rept. 1466, 79th Cong., 1st Sess., p. 10) that "your committee has thought it wise to be most explicit in setting out all the classes of cases—even though they may be mutually overlapping" in order that all possible claims be covered. Accordingly, there are present in this statute none of the reasons which might lead the Court in the case of a statute with a different history to apply the rule *expressio unius*. The fact that suit for a taking of Indian title is twice authorized before

the Indian Claims Commission does not detract from the fact that it is authorized once before the Court of Claims.

### Conclusion

This State's then Attorney General represented to this Court the State's interest in the *Northwestern Bands of Shoshone* case, 324 U. S. 335, though the Court held, contrary to the State's position, that the treaty with those bands did not constitute a "recognition." Since then, those bands, with other Indians having similar claims, have received from Congress jurisdiction to sue for the taking of their Indian title, granted by the Indian Claims Commission Act. Thereby, their legal rights have been freed from the taint of political question which until then had encumbered them; thereby the taking of their lands became "compensable." The judgment of the Court of Claims should be reversed.

Respectfully submitted,

STATE OF UTAH,

*Amicus Curiae.*

By E. R. CALLISTER,

*Attorney General.*

(7777)



MAR 12 1955

HAROLD R. WILLEY, Clerk

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1954

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No. 43

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THE TEE-HIT-TON INDIANS, an identifiable group of Alaska  
Indians, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

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**PETITION FOR REHEARING**

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**PETITION FOR REHEARING**

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Now comes petitioner, by its counsel, and prays for a rehearing.

Rehearing should be granted because this Court's judgment rests upon an opinion which shows on its face complete misconception of the record, studied avoidance of even the slightest consideration of the chief proposition relied upon—and argued *in extenso*—by petitioner, utter ignoring of basic principles established by many decisions of this Court, and similar ignoring of the recognized principles of international law.

This suit was based primarily on a claim of full proprietary ownership in fee simple (R. 2; Pet. Br. 14-36).

Unless and until that claim is decided adversely as a consequence of serious consideration, the opinion's page after page of discussion of the mere incidents of lesser "original Indian title" contributes nothing to a lasting disposition of the problems presented by this and related cases.

Turning to the key paragraph of the opinion at the bottom of page 12 of the advance print, these Indians never urged that it was their stage of civilization and their concept of ownership that took them out of the rule of "original Indian title." It was suggested only as "preliminary considerations" that those and similar facts might well allay such misgivings on the part of members of this Court as are referred to in the opinion's concluding paragraphs (Pet. Br. 8-13).

When the next sentence to the effect that they assert that Russia never took their lands in the sense that European nations seized the rest of America is compared with the immediately following sentences, and especially with what is not said, the inadequacy and failure of the opinion as an answer thereto cannot be ignored.

What if the Court of Claims "saw no distinction between their use of the land and that of the Indians of the Eastern United States" (fourth sentence)? The nature of that "use" in either instance is wholly immaterial on the question of ownership, unless indeed the instant decision is intended to overrule the great leading cases in this field and thus destroy the whole foundation of the decisions of the past century and a half. If so, this Court owes it to the bar and to the nation to say so directly.

But if not, we submit that this Court cannot ignore its own decisions that even those very Indians of the Eastern United States

"were considered as **owning** [the lands they occupied] as their **common property**. \* \* \* Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were

as much in their actual possession as the cleared fields of the whites, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them; made a cession to the Government; or an authorized sale to individuals." (*Mitchell v. United States*, 9 Peters 711, 745-746, and cases cited in Pet. Br. 15-16.)

There is no pretense of any of those conditions having been satisfied here.

Nor can this Court ignore its unequivocal declaration in the same *Mitchell* case

**"That by the law of nations, the inhabitants, citizens or subjects of a conquered or ceded country, territory or province, retain all the rights of property which have not been taken from them by the orders of the Conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed."** (9 Peters 711, 734, Pet. Br. 32.)

So much for the law, as it has been declared by this Court. Turning now to its application to the instant record, complete misconception of the evidence is evinced by the statement that the court below "had no evidence that the Russian handling of the Indian land problem differed from ours."\* On the contrary, not merely the evidence but also that court's own formal findings of fact are to the directly opposite effect. To briefly summarize those findings, Russia (which did not take over Alaska until the turn of the Nineteenth Century when, as developed in Pet. Br. 24-26, international law no longer considered the bare fact of discovery as a sufficient ground of proprietary right) never extended its administration into the Tee-hit-ton area, and deliberately refrained from claiming on the basis of the right of prior discovery more territory than it could claim by right of first permanent settlement; in the charters of its sole "licensee" it forbade acquisition

\* The United States was not a discoverer, and presumably "ours" is intended to refer to our predecessor sovereigns.

in this area even of a trading post except with consent of the Indians; and in 1867 it formally advised the United States that no necessity ever occurred to introduce any system of land ownership (Findings 9-16 at R. 28-30). The British Government on the other hand had from the earliest days of its American colonies asserted title to all the land within those colonies and implemented that assertion by grants of vast areas to great landed proprietors. *Johnson v. McIntosh*, 8 Wheat. 543, 574; and cf. *John Bassett Moore* at Pet. Br. 25.

Wholly irrespective of what Russia may have taken or brought under its administration in the Aleutian Islands or elsewhere in Alaska, the court below expressly found that the Tlingit area here in question was considered as independent. (Finding 12 at R. 28.) And the identically same authority on international law cited to this Court by respondent for a mere generality goes right on in his next paragraph to declare specifically that the actual establishment of a civilized administration is necessary to give a good title. (Pet. Rep. Br. 8.)

Neither Russia nor the United States has by either word or deed ever assumed to conquer one inch of the Tee-hit-ton area here in issue. On the contrary Congress has gone to the very opposite extreme of legislating that Alaska's Indians should not be disturbed in the possession of even the "lands \* \* \* claimed by them." The Acts of 1884 and 1900 dealt with Alaska alone. If this Court is a Court of law and justice—and not a Twentieth Century reincarnation of that same "force" to which it refers on page 17 of the opinion—by what right does it leave the decision of this branch of the case hanging in the air on such a grievously incomplete ruling as that the effect of those statutes was merely to preserve the status quo. All of which means very little unless all the necessary implications of that status quo are developed. It is particularly urged that the majority of the Court should give further consideration to the views expressed by the three dissenting

Justices that the case should be remanded for findings as to what Indian rights were intended to be protected. Or are those statutes now held to have been intended as mere shams?

The cavalier manner in which the opinion disposes of those statutes is irreconcilable with this Court's scholarly and well considered opinion in *Shoshone Tribe v. United States*, 299 U.S. 476, 496, 497. There, as has now been held in the instant case, title "was always in the United States", and the Indians had only a "right of occupancy". But in neither instance did that right derive as a matter of law from so called original Indian title. In that case it stemmed from a *treaty* provision for "undisturbed use and occupation of the Shoshone Indians". In the case at bar this branch of the case stems from a *statutory* provision that "the Indians \* \* \* shall not be disturbed in the possession of any lands actually in their use or occupation". In that case this Court unanimously sustained a recovery, and declared that

"The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is as sacred as that of the United States to the fee".

How can the majority in the present case rationalize their holding such a pledge in an Act of Congress as something less sacred than a pledge using the very same words in an Indian treaty?

And especially so, if we are to understand from page 17 of the opinion that our Nation's highest Court now stigmatizes as a colossal fraud and sham that whole eighty-five year series of 372 Indian treaties which were formally ratified by the Senate and duly published in the Statutes at Large of the United States (Report of Commissioner of Indian Affairs for 1872; 7 Stat., et seq.), and so many of which have been held (as noted at page 5 of the opinion) as constituting "recognition" sufficient to support suits against the United States?

Every member of petitioner group is a citizen of the United States. 43 Stat. 253; 53 I.D. 593. In invoking the processes of this Court they seek—and are entitled to—the same serious consideration and adjudication of the legal rights of the group as this Court accorded the Shoshone Indians in the case just cited. And as it has in similar recognition of its duty and responsibilities accorded to a host of other Indian cases too numerous to name. But this these Indian citizens have been denied in the instant case. It is most respectfully submitted that continuance in that denial after an analysis spelled out as in this petition would inevitably leave its own train of “stultifying implications” even more serious than those so keenly sensed by the District Court in its historic opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 577; judgment affirmed, 343 U.S. 579. For the position chiefly relied upon by petitioner cannot possibly be regarded as frivolous in the legal sense of that term. That is established by instance after instance of its acceptance by respondent’s own administrative agencies (Pet. Br. 36-41). And to let stand an opinion which brushes aside such an issue with nothing more than the *ipse dixit* and misstatements of a paragraph such as that at the bottom of page 12 of the opinion would seem unthinkable on the part of a Court dedicated to the cause of justice as between citizens and their sovereign as well as between individuals.

Respectfully submitted,

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March, 1955



**Certificate**

I certify that the foregoing petition is presented in good faith and not for delay.

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